No. 93.

Brief of Lindsay & Bruce for P. E.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed Oct. 2, 1900.

No. 93.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

versus

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

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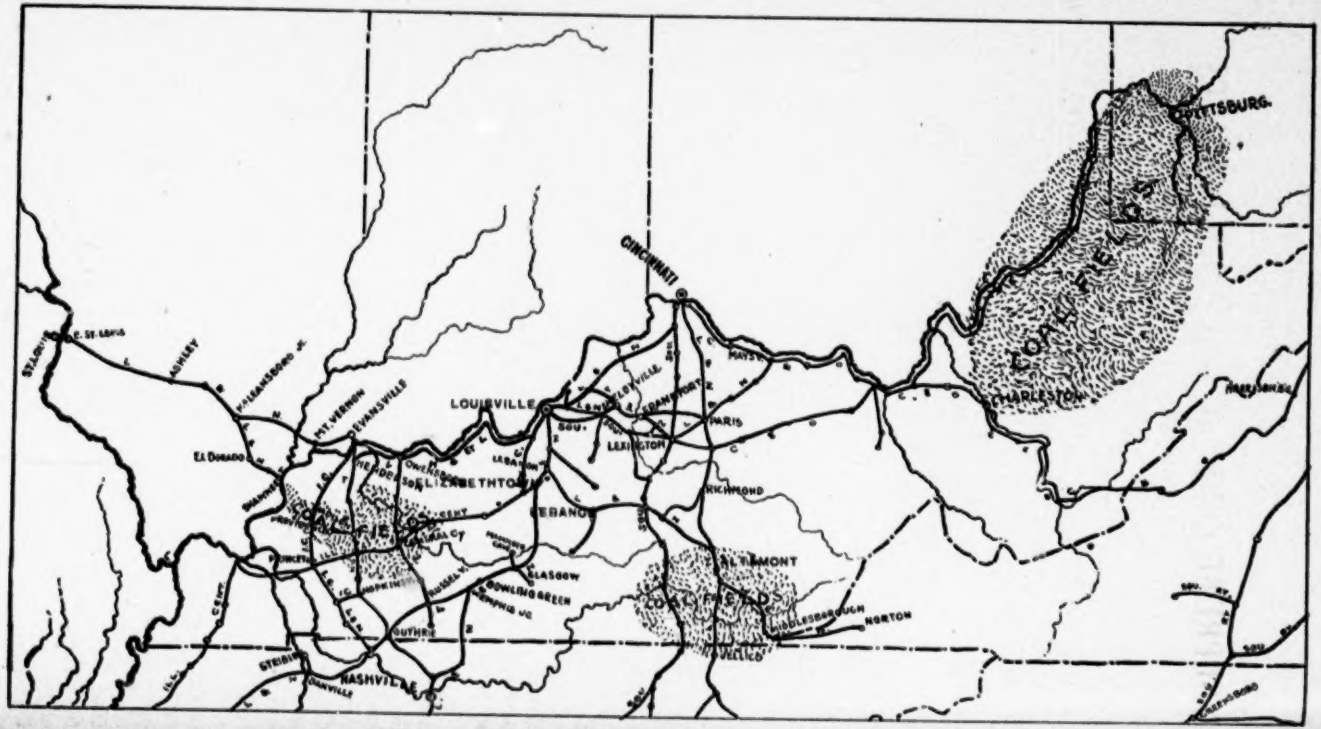
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STATEMENT OF THE CASE.

Plaintiff in error, which will be hereinafter referred to as the Railroad Company, was indicted in the Marion Circuit Court for an alleged violation of Section 820, Ky. Stats., in charging more for the transportation of coal from Altamont, Kentucky, to Lebanon, Kentucky, than to Louisville and Elizabethtown, Kentucky, over railroads which the Railroad Company was operating under the charter granted to it by the State of Kentucky. The attached map shows the relative situation of these places and of other points which are referred to in the record. Section 820, Ky. Stats., is as follows:

"If any person, owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance; such person shall for each offense be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin Circuit Court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the Railroad Commission, that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the Commission to investigate the grounds of complaint; and if, after such investigation, the Commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the

railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order, the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the Commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order, it shall be the duty of the Commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the Commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

This section is based upon Section 218 of the Constitution of Kentucky, which is as follows:

"It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: Provided, that upon application to the Railroad Commission, such common carrier, or person, or corporation, owning or operating a railroad in this State, may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation owning or operating a railroad in this State, may be relieved from the operations of this section."

On trial of the indictment, a plea of not guilty having been entered, the facts justifying and necessitating the rate adjustment in question were offered in evidence by the railroad company, excluded from the jury by the court, but duly made part of the record, and are briefly as follows:

Louisville originally obtained its coal supply entirely from the Pennsylvania and West Virginia mines, the coal being brought down the Ohio River. When the Louisville & Nashville Railroad was constructed from Louisville to Lebanon Junction, and thence to Lebanon, the latter place was for the first time able to get coal. This coal it obtained from the Pennsylvania and West Virginia mines by way of Louisville, and it had to pay more for coal than Louisville by at least the amount of the freight from Louisville to Lebanon. Subsequently, the Louisville & Nashville Railroad was extended from Lebanon into the southeastern Kentucky coal fields, from which Lebanon

thereafter got its coal. But it still had to pay much more for such coal than Louisville had to pay for Pennsylvania and West Virginia coal, as the rail rate from the southeastern Kentucky coal mines to Lebanon was much more than the river rate from Pennsylvania and West Virginia mines to Louisville, for the Ohio River afforded Louisville the cheapest known means of transportation. Thus Louisville continued to get practically all of its coal by river from Pennsylvania and West Virginia mines, and very much more cheaply than Lebanon could get coal from any place.

In 1883, many years before the adoption of the Kentucky long and short haul law, the Railroad Company established rates from the southeastern Kentucky coal mines to Louisville low enough to enable the coal from those mines to compete with coal reaching Louisville by river, and thereby created a traffic which was valuable to the Railroad Company and to all places or interests involved without working any injury in any direction.

This arrangement gave the mines a market for their surplus, which had theretofore been largely wasted, and permitted much steadier operation than when they had to depend entirely upon the smaller and irregular local demand.

The Railroad Company had to maintain its railroad and equipment, whether it carried coal to Louisville or not, and could well afford to secure this additional traffic at extremely low rates, for even at such rates it would obviously increase its revenue more than it increased its expenses. The right to engage in this traffic was, therefore, of great value to the Railroad Company. Likewise the coal operators had to and did sell their surplus coal in Louisville at much lower prices than they could afford to take for their coal at interior local markets like Lebanon, and yet because what they sold in Louisville was their surplus, produced with but slight, if any, additional cost, it was obviously to their interest to sell it at such prices, and the value of their property would have been materially impaired if they had been denied the right to do so.

This arrangement did not increase the rate to Lebanon, which was and continued to be only a just and reasonable rate for the service performed. On the contrary, Lebanon was decidedly benefited, because the reduction in the cost of mining resulting from the opening of this new market to the Kentucky mines led to a substantial decrease in the price of coal at Lebanon, and the resulting increase in mining operations led to an increase in the demand at the mines for supplies, which was largely supplied by Lebanon and similar local points.

The rate to Louisville was made no lower than was absolutely necessary to meet the competition of the Pennsylvania and West Virginia coal, so that the advantage which Louisville, by reason of its favorable location, already enjoyed over Lebanon was not increased.

In addition to the specific benefit derived by the Railroad Company from the increase of its revenue, due to the traffic thus created, it derived the general benefit which must always result in common to all the interests of the community from any such substantial development of an

important business interest, when it can be done, as it was in this case, without the possibility of any injury to any individual or locality. (Transcript, pp. 25–31.)

The conditions existing at Elizabethtown were similar, though on a much smaller scale, to those existing at Louisville. Elizabethtown, being much nearer to Louisville than Lebanon, was able originally to get Pennsylvania and West Virginia coal cheaper than Lebanon could, and, subsequently, on account of the development of the western Kentucky coal mines, and of its proximity thereto, it got cheaper coal therefrom than Lebanon got from the southeastern Kentucky coal mines. The principles already stated actuated the Railroad Company in carrying coal to Elizabethtown at a low rate to compete with the coal from western Kentucky mines, and the practice was beneficial to all parties concerned, and yet gave Elizabethtown no advantage over Lebanon which it had not theretofore enjoyed. (Transcript, pp. 54–56.)

The Railroad Commission of Kentucky, pursuant to the authority conferred upon it by Section 820, Ky. Stats., investigated the matter and refused to give the relief which it was authorized to give to the Railroad Company, but recommended and procured an indictment.

The record also shows that while in some sections of the United States the density of population and character of railroad traffic may be such as to admit of intermediate rates being reduced to the level of low competitive rates, such is not the case in the State of Kentucky; that in Kentucky, while it is essential to the prosperity of railroad companies that they shall engage in the traffic to competitive points, the rates to non-competitive points can not be reduced to the same low basis. (Transcript, pp. 31–36.)

The railroad company further offered, as is shown by its avowal to that effect, to show that the construction given to the Kentucky long and short haul law by the court would seriously affect the rates on much important interstate traffic, in view of the fact that a directly opposite construction was given to the long and short haul clause of the Interstate Commerce Act, and that in order to avoid the most unjust discrimination between localities in other States and adjoining localities in Kentucky affected by precisely the same conditions, and at the same time avoid the penalties imposed for violation of the Kentucky long and short haul law, the carriers might be forced to alter their interstate rates in many instances, and that thus the Kentucky long and short haul law, so construed, would operate as an unreasonable, injurious, and entirely needless interference with commerce among the States. (Transcript, pp. 36–40.)

The Court gave the jury what amounted to a peremptory instruction to find the Railroad Company guilty. The jury accordingly returned a verdict of guilty, fixing the fine at $300, for which judgment was rendered. The Court having overruled the Railroad Company's motion for a new trial, an appeal was prosecuted by the Railroad Company to the Court of Appeals.

In discussing Section 218 of the Constitution and Section 820, Ky. Stats., we will, for brevity, refer merely to the constitutional pro-

vision, and speak of it simply as "Section 218," it being understood that such reference embraces also the statutory provision, which is merely a copy of the constitutional provision, with the addition of machinery to enforce it.

It was our contention in the Court of Appeals that Section 218, if properly construed, did not prohibit charging more for a short than for a long haul where the short haul rate was the Railroad Company's ordinary standard rate for that distance and just and reasonable in itself, and where the long haul rate was reduced below the short haul rate to meet actual, controlling, and unavoidable competition, was made no lower than was absolutely necessary to meet such competition, and not so low as to entail an actual loss upon the Railroad Company. It is clear that the facts shown in this record bring the case fully within these limitations. We further contended that if Section 218 was so construed as to prohibit engaging in such competitive traffic under such conditions, except in cases where the Railroad Commission in the exercise of purely arbitrary power might consent to it, it would be an arbitrary interference with the Railroad Company's right to engage in legitimate railroad business, which right, subject only to reasonable regulations in the exercise of the police power of the State, is secured to the Railroad Company by those provisions of the Constitution of the United States forbidding any State to deprive any person of liberty or property without due process of law, or to deny to any person the equal protection of the laws; or to pass any law impairing the obligation of contracts, (the Railroad Company having by virtue of its charter a contract right to engage in legitimate railroad business).

We also contended that such construction of Section 218 would make the section void as an unwarrantable interference with interstate commerce for the reasons shown in the record.

The Court of Appeals, by a bare majority (four to three), followed without qualification its opinion in another and earlier case of the same style, L. & N. R. Co. v. Commonwealth, 20 Ky. Law Rep. 1380 (the opinion and dissenting opinion in which are printed as an appendix to this brief), and thus held that Section 218 absolutely prohibited charging more for a short than for a competitive long haul in the case presented by the record, and that in no case could any competition justify charging less for the longer haul than for the shorter haul, except in cases where the Railroad Commission might choose to suspend the constitutional prohibition, and that the power of the Commission was a power with which the court could not interfere, and that it could neither compel nor prohibit action by the Commission. In other words, the court held that Section 218 is an absolute prohibition of engaging in any competitive traffic, at less than the reasonable and necessary standard rates to shorter distance, non-competitive points, except when consented to by the Railroad Commission, and that the Commission's power to suspend the prohibition is absolute and free from judicial review or control.

The Court of Appeals having thus construed Section 218, our contention in this Court is that it erred in upholding and enforcing that

section so construed, notwithstanding its repugnancy to the Constitution of the United States in the particulars above mentioned.

These questions were raised and decided adversely to the rights thus asserted under the Constitution of the United States, both by the Circuit Court and the Court of Appeals. Under the Kentucky practice the Railroad Company could make its defense only under a plea of not guilty. Sec. 172 of the Kentucky Code of Practice in Criminal Cases reads as follows:

"Sec. 172. *Pleas that may be entered.* There are but three kinds of pleas to an indictment:

1. A plea of guilty.
2. Not guilty.
3. A former conviction or acquittal of the offense charged, either of which may be pleaded with or without the plea of not guilty."

Section 175 of that Code is as follows:

"Sec. 175. *Effect of plea of not guilty.* The plea of not guilty is a denial of every material allegation in the indictment; and all matters of fact tending to establish a defense, other than a former conviction or acquittal, may be given in evidence under it."

The Federal questions here relied upon could not, therefore, be set up in any pleading, but the record shows that they were raised and decided adversely by the Circuit Court upon offers to introduce testimony showing the facts above stated, and the Court refused to admit such evidence on the ground that the contentions above set out were not well taken, and distinctly decided against those contentions. The questions were again raised upon motion to instruct the jury to find for the Railroad Company, and again raised in the motion for a new trial, and were each time decided against the Railroad Company.

The questions were thus presented in the record, and were relied upon in the Court of Appeals, and expressly decided by the Court of Appeals adversely to the contention of the Railroad Company. Chief Justice Hazelrigg and Judges Burnam and DuRelle dissented upon the ground that Section 218, as construed by the Court, would result in an unwarrantable interference with the reasonable use of the Railroad Company's property to an extent not permitted under the Federal Constitution, and would, therefore, be clearly in conflict therewith in the particulars urged by the Railroad Company. Their views to this effect are set forth in the dissenting opinion by Chief Justice Hazelrigg.

ARGUMENT.

I.

Ordinarily when this Court is called upon to decide whether a State enactment contravenes the Federal Constitution in a case brought before it on writ of error to the highest State court having jurisdiction, it is confronted by the fact that both the law-making power and the judicial power of the State have reached the conclusion that the enactment in question does not contravene the Federal Constitution. But in this case the construction of Section 218, adopted by four out of seven judges of the Court of Appeals, is so palpably a misconstruction of the language used by the Constitutional Convention that it can in no proper sense be said that we are assailing the action of the Constitutional Convention or questioning its wisdom.

Section 218 is a part of the Constitution framed by the Constitutional Convention at its session ending in April, 1891. It is an exact copy of Section 4 of the Act of Congress of February 4, 1887, known as the Interstate Commerce Act, with only such changes as are necessary to apply the section to transportation in Kentucky instead of interstate transportation.

June 15, 1887, the Interstate Commerce Commission, in an elaborate opinion delivered by Chairman Cooley, held that the prohibition of the fourth section of the Interstate Commerce Act was limited to cases in which the circumstances and conditions were substantially similar, and that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions, entitling the carrier to charge less for the longer than for the shorter haul without any necessity for application to the Commission.

In re L. & N. R. Co., 1 Int. Com. Com., Rep. 31.

This construction had been upheld and acted upon by the Interstate Commerce Commission, and was well known from that time up to the time of the incorporation of that identical provision into the Constitution of Kentucky. It had also at that time received the sanction of the only two Federal courts which had been called upon to construe the section.

Mo. Pac. R'y Co. v. T. & P. R'y Co., 31 Fed. Rep. 862 (decided June 21, 1887).

Ex parte Koehler, 31 Fed. Rep. 315 (decided July 4, 1887).

This construction has since been followed almost uniformly by all the Federal courts, and no other court or tribunal has ever pretended to say that the words "circumstances and conditions" exclude every sort of competition, nor has any such contention ever been made even in any dissenting opinion. This construction had, before the decision of the Court of Appeals of Kentucky, been definitely approved and established by this Court in Int. Com. Com. v. Alabama Midland R'y Co., 168 U. S. 144. It has since been reaffirmed in L. & N. R.

Co. v. Behlmer, 175 U. S. 648. If Section 218 had been similarly construed, we could not contend that it would in any way conflict with the Federal Constitution.

There were at least three distinct grounds upon which, according to elementary rules of construction, it was absolutely clear that the Constitutional Convention intended that Section 218 should have the same meaning.

First. The natural meaning of the words when applied to the subject-matter in the light of the obvious purpose to prevent only unjust discrimination between localities, and in the light of practically the whole jurisprudence, both English and American, upon the subject of competition as affecting the rates of carriers, demanded this construction, and it was fortified by a long line of decisions of the highest authority, concluding with the decision of this Court in the Alabama Midland case, 168 U. S. 144.

Second. The provision was an exact copy of the provision of the Interstate Commerce Act, and if the Constitutional Convention of Kentucky had not intended that the provision should have the same meaning which for four years had been generally understood to attach to the provision of the Interstate Commerce Act, it clearly would not have copied that language.

Third. By copying the provision of the Interstate Commerce Act the Constitutional Convention indicated that it was the policy of the State to apply to intrastate long and short haul traffic exactly the same rule applied to interstate long and short haul traffic.

The Court of Appeals, however, virtually ignored all these grounds. It brushed aside the decisions of this Court in T. & P. R'y Co. v. Int. Com. Com., 162 U. S. 197, and Int. Com. Com. v. Alabama Midland R'y Co., 168 U. S. 144, in which the whole history and philosophy of rate regulations, both in England and America, had been discussed and shown to require the construction which was put upon Sec. 4 of the Interstate Commerce Act, with the brusque comment that "whatever construction that high tribunal may put upon section 4 of that Act, we, in exercise of the province belonging to the Supreme Court of each State to construe its own laws, have endeavored to so construe section 218 as not to kill it."

While ordinarily arguments to show that the State Court erred in matters not subject to review by this Court may be irrelevant here, these comments seem pertinent, because they show so clearly that what we contend is an unconstitutional construction of Section 218 can not be presumed to have had the sanction of the Constitutional Convention. It has, moreover, the least possible sanction from the Court of Appeals, as three of the seven judges dissented, believing that the construction adopted by the majority was not only incorrect, but that it was in conflict with the Federal Constitution.

II.

That enactments established by a State in the exercise of the so-called police power may be examined by this Court and declared void, if in conflict with the Constitution of the United States, is, of course, not open to question.

In Mugler v. Kansas, 123 U. S. 623, 661, the Court said:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In Lawton v. Steele, 152 U. S. 133, 136, the Court, after citing various examples of the proper exercise of the police power by the States, said:

"Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. Barbier v. Connolly, 113 U. S. 27; Kidd v. Pearson, 128 U. S. 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference, and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In Lake Shore & Mich. Sou. R. Co. v. Smith, 173 U. S. 684, 699, the Court, although reiterating the well-recognized power of the legislature

"to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience, or proper protection of the public,"

held, that,

"this particular piece of legislation does not partake of the character of legislation fairly or reasonably necessary to attain any of those objects, and that it does violate the Federal Constitution as above stated."

Section 218, as construed by the Court of Appeals, either requires the Railroad Company to reduce its rates on coal from the southeastern Kentucky mines to Lebanon and other local points so as not to exceed the low competitive rate to Louisville, which means compelling the Railroad Company to carry its local traffic at substantially reduced rates, to be fixed in an absolutely arbitrary way without any inquiry by any tribunal to determine that the existing rates are unreasonable—and when in fact they are reasonable—or to determine that the lower rates thus forced are reasonable—and when in fact they would be unreasonable—and without any opportunity for the Railroad Company to invoke in any form judicial inquiry or judicial protection in the premises; or it requires the Railroad Company to advance the rate on coal from the southeastern Kentucky mines to Louisville so as to equal the rate to Lebanon, which means the destruction of the coal traffic to Louisville; with the power, however, in the Railroad Commission, which is final and conclusive and beyond any judicial control, to allow the Railroad Company both to enjoy reasonable rates for its local traffic and to retain its competitive traffic in cases where the Commission may choose to grant such permission. The section does not prescribe any rule or condition upon which the Railroad Company may be entitled to obtain from the Railroad Commission the right to enjoy both reasonable rates for local traffic and to continue in the competitive traffic. But the power given the Railroad Commission is to be exercised at its mere will, and, as expressly held by the Court of Appeals, acknowledges neither guidance nor restraint.

Likewise, all carriers must, where long haul competitive traffic is involved, either carry intermediate traffic at abnormally low rates, arbitrarily fixed in the absence of and without the possibility of judicial or other inquiry, or give up perfectly legitimate and valuable competitive traffic, unless the Railroad Commission, in the exercise of its mere will, permits them to continue to enjoy both their competitive traffic and reasonable rates for their non-competitive traffic.

We contend that Section 218 with the meaning thus forced upon it has no reasonable relation to securing for the public reasonable rates or the prevention of extortion or undue charges, or the promotion of the safety, health, convenience, or proper protection to the public; but that it amounts to an arbitrary and wholly unreasonable interference with perfectly legitimate business, and is, therefore, in conflict with the Fourteenth Amendment of the Constitution of the United States; and since the Railroad Company has built its railroads in the State of Kentucky upon the faith of a charter granted it by the State authorizing it to operate those railroads, it has a contract right to engage in such legitimate railroad business, and any such arbitrary interference therewith as results from such a construction of Section 218 would impair the obligation of that contract.

III.

Section 218, with the construction given it, could only be justified either as an effort to secure rates in themselves reasonably low to the shorter distance point, or to prevent unjust discrimination between the shorter distance localities and the longer distance localities theretofore enjoying the lower rates.

Such construction of Section 218 can not be regarded as a reasonable or proper attempt to secure reasonably low rates for the shorter hauls. In the first place, it does not secure such rates, but leaves the matter optional with the Railroad Company. But, aside from this, such attempt is open to precisely the same objection which this Court found fatal to the Michigan statute involved in the case of Lake Shore & Michigan Southern R. v. Smith, 173 U. S. 684, which was an act requiring the sale of 1000-mile tickets at a rate less than the ordinary passenger fare, and in which this Court said:

"The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation."

If the effect of Section 218 is to reduce the short haul rates to the level of the long haul rates, it, too, will make an exception in favor of a particular class in the community, and compel the Railroad Company to carry for the members thereof at a less sum than it would have a right to charge those who were not so fortunate as to be members thereof. Take, for example, a point five miles north of Lebanon Junction towards Louisville and a point five miles south of Lebanon Junction towards Elizabethtown on the Railroad Company's line between Louisville and Elizabethtown. These two points are by railroad exactly the same distance from the coal mines at Altamont, the conditions surrounding them are precisely the same, and they are manifestly entitled to the same coal rates. The rate from Altamont to Louisville via Lebanon Junction is $1.00 per ton, and the rate from Altamont to Elizabethtown via Lebanon Junction is $1.30 per ton. If Section 218 operates to reduce the short haul rates to the level of the long haul rates, it would reduce to $1.00 per ton the rate on coal to the point five miles north of Lebanon Junction on the line to Louisville, while permitting a rate of $1.30 per ton on coal to be maintained to the station five miles south of Lebanon Junction on the line to Elizabethtown, or a still higher rate if the Railroad Company, while retaining its $1.00 rate to Louisville, chose to abandon the competitive $1.30 rate to Elizabethtown and increase its rate to the latter point to its standard rate for that distance. Such examples could be multiplied indefinitely. They show that the section, if it operates to reduce the short haul rates to the level of the long haul rates, would, instead of insuring reasonable rates to the public gener-

ally, bring about the most remarkable and indefensible inequalities between places entitled to exactly the same rates. These examples go to show very strongly what is undoubtedly the fact, that Section 218 was never designed, even by the Court of Appeals, to remedy rates unreasonable in themselves, but was only designed to prevent discrimination between localities.

But the most vital objection to Section 218 regarded as an effort to reduce local non-competitive rates to the basis of long haul competitive rates is that such reduction is essentially arbitrary. It proceeds upon no rule as to what is just and reasonable, and admits of no regulation to secure what is just and reasonable. Very low rates which are forced by controlling an unavoidable competition, and yet which are high enough to increase the carrier's income more than its expenses, can not be regarded as a criterion for non-competitive rates, and to say that all non-competitive rates shall be reduced to the basis of competitive rates, regardless of whether those non-competitive rates are in themselves just and reasonable, is the very essence of arbitrary interference. Ever since the decision of Chicago, &c., R'y Co. v. Minn., 134 U. S. 418, it has been settled that what is a reasonable rate to be charged by a common carrier is a question with respect to which the carrier is entitled to judicial investigation and judicial protection. But no such opportunity of judicial investigation or protection can possibly exist with respect to an enactment which requires either that a carrier shall reduce its local rates to the basis of lower rates for longer hauls enforced by legitimate competition or abandon that legitimate competitive business. If such enactment is valid, then all that is left for the carrier is to make its choice. It must either reduce its local rates, no matter how reasonable, to a substantially lower basis, no matter how unreasonable, and without any investigation or any opportunity to have an investigation of the question of whether its existing rates are unreasonably high or the rates thus forced upon it are unreasonably low, or it must give up its competitive traffic, no matter how valuable to it or beneficial to the public.

Section 218, as construed by the Court of Appeals, can not be upheld as a proper exercise of the police power to prevent unjust discrimination between localities, because it goes too far and prohibits discriminations between localities such as exist in the present case, which are admittedly just and proper and essential to the successful operation of the railroad, and which do not work any injury or injustice in any direction.

That carriers encounter competition of a character which they can rightfully recognize at points where it exists without doing the slightest injury at points where it does not exist, is clearly established. It has been fully recognized by the courts both in England and America. That recognition of such competition is important in many cases to the interests of the carriers, and that in some sections of this country such recognition of it is absolutely essential to their welfare, are facts likewise well established. All these facts appear without dispute in this record, both in a general way and with respect to the coal traffic which is here involved, and for the purposes of this case must be taken as true.

The rate to Lebanon is only the Railroad Company's regular standard rate for that distance, which is not attacked as unreasonable, but on the other hand is admitted to be just and reasonable, and the lower rates to the competitive points are necessitated by controlling unavoidable competition, and are high enough to increase the Railroad Company's revenue more than its expenses, and therefore have no tendency to increase the rate to Lebanon, and do not in any wise increase the advantage which the competitive points would have over Lebanon. Such discrimination is obviously just and proper. The coal traffic to the competitive points is of substantial value to the Railroad Company, and to compel the Railroad Company to withdraw from such traffic would inflict upon it a most serious loss. It is a valuable and legitimate branch of the Railroad Company's traffic, and the State's power to prevent unjust discrimination gives it no power, under such circumstances, to destroy such traffic, for its destruction has no substantial relation to the prevention of unjust discrimination.

Viewed, therefore, either as an effort to cut down the short haul rates to the level of the long haul rates, or as an effort to increase the long haul rates to the level of the short haul rates, and thereby destroy the competitive business, Section 218, as construed by the Court of Appeals, is not a proper exercise of the police power, but is an unwarrantable interference with the constitutional rights of carriers.

In *Ex parte* Koehler, 23 Fed. Rep. 529, a receiver of a railroad, appointed by the United States Circuit Court for the District of Oregon, applied to the Court for instruction as to complying with the Oregon statute regulating railroad rates. One of the sections of the statute prohibited, without any qualification, the charging of more for a short than for a long haul in the same direction, and thus had the same effect as Section 218, as construed by the Court of Appeals, except that the latter gives the Railroad Commission power to grant relief.

In other respects the Court instructed the receiver to comply with the law, but, while pointing out that the right of a corporation to fix its rates was not absolute, and that the legislature might limit the same to what was reasonable, instructed him not to comply with the terms of the long and short haul section of the statute where a less charge for a longer distance was necessitated by competition. The Court said:

"As to the matter of long and short hauls, the question, although *prima facie* one of discrimination, directly involves the right to a reasonable compensation. I assume that the State has the power to prevent a railway company from discriminating between persons and places for the sake of putting one up or another down, or any other reason than the real exigencies of its business. Such discrimination, it seems to me, is a wanton injustice, and may therefore be prohibited. It violates the fundamental maxim, which in effect forbids any one to so use his property as to injure another, *sic utere tuo ut alienum non laedas*. The provisions of the act that I have condensed in paragraphs 3, 4, and 6, aforesaid, are intended to prevent this practice. But where the discrimination is between places only, and is the result

of competition with other lines or means of transportation, the case, I think, is different. For instance, the act prescribes a reasonable rate for carrying freight between Corvallis and Portland, or from either to points intermediate thereto. But Corvallis is on the river and has the advantage of water transportation for some months in the year. The carriage of goods by water usually costs less than by land, and as water craft are allowed to carry at a rate less than the maximum fixed for the railway, they will get all the freight from this point, unless the latter is allowed to compete for it. But if, to do this, it must adopt the water rate for all the points intermediate between Portland and Corvallis, where there is no such competition, it is, in effect, required to carry freight to and from such points at a less rate than that which the legislature has declared to be reasonable, or else give up the business at Corvallis altogether. And the same result would follow as to Salem and other points on the east and west side lines, where there is convenient access to water transportation.

"If the Legislature can not require a railway corporation, formed under the laws of the State, to carry freight for nothing, or at any less rate than a reasonable one, then it necessarily follows that this provision of the Act can not be enforced so far as to prevent the railway from competing with the water craft at Corvallis and other similarly situated points, even if in so doing they are compelled to charge less for a long haul than a short one in the same direction."

If Section 218 contained no proviso authorizing the Railroad Commission to permit less charges for longer hauls in cases of legitimate competitive as well as other cases, it would, for the reasons stated and on the authorities cited, be clearly in conflict with the Federal Constitution, but that conflict is much intensified by the existence of the proviso, because,

First. The proviso necessarily negatives the idea that the law-making body regarded an excess in the short haul rate over the lower competitive long haul rate as, *per se*, an evil; and,

Second. Even if it were proper to prohibit absolutely the charging of more for short than long hauls, yet where the law does not do so, but recognizes that there may be legitimate traffic which would thereby be interfered with, it is manifestly unconstitutional to entrust the dispensation of the right to engage in such clearly legitimate traffic to a mere administrative tribunal without any rules by which it may be guided, without specifying any conditions upon which the carriers shall be entitled to enjoy such legitimate traffic, and absolutely free to give its consent or withhold its consent at its own pleasure and will in any and all cases without judicial review or control. This is precisely the effect of the proviso to Section 218, as construed by the Court of Appeals.

The operation of this proviso brings the case clearly within the doctrine of Yick Wo v. Hopkins, 118 U. S. 356. In that case this Court considered certain ordinances of the Board of Supervisors of San Francisco County, declaring it unlawful for any person to carry on a laundry within the city or county of San Francisco in any building other than one constructed of brick or stone without first obtain-

ing the consent of the Board of Supervisors. After referring to some observations by the Supreme Court of California relative to the ordinances, this Court said:

"That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised under a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confined to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

After pointing out that the ordinances involved in Barbier v. Connolly, 113 U. S. 27, and Soon Hing v. Crowley, 113 U. S. 703, simply prescribed reasonable regulations, the Court continued:

"The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is

submitted to the judgment of the officer and calls for the exercise of a discretion of a judicial nature.

. . . . . .

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'May be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails as being the essence of slavery itself."

The Court quoted with approval from the case of City of Baltimore v. Radecke, 49 Md. 217, involving the validity of an ordinance, providing that any engine might be removed after six months' notice to that effect from the mayor, wherein the Court of Appeals of Maryland said:

"It does not profess to prescribe regulations for their construction, location, or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But, if he should not choose to do this, but only to act in particular cases,

there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbors; and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being brought under cover of such a power, for that becomes apparent to every one who gives the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

It is true that in Yick Wo v. Hopkins it appeared that there had been the most unjust discriminations under the ordinance. But the observations above quoted go to show that any enactment conferring such arbitrary powers relative to any lawful employment must in itself be unconstitutional. That case has been followed in numerous cases wherein it has been held that such ordinances are void, *per se*, regardless of whether there had actually been injustice in their administration. See

Ex parte Sing Lee, 96 Cal. 354.
City Sioux Falls v. Kirby, 6 S. D. 62.
City of Richmond v. Dudley, 129 Ind. 112.
State v. Mahner, 43 La. 496.

These principles are illustrated further by the case of Gundling v. Chicago, 177 U. S. 183, which involved the validity of an ordinance in Chicago, providing that when any person desiring to sell cigarettes should make proper application and give evidence that he was a person of good character and reputation, it should be the duty of the mayor, if satisfied that the applicant was of good character and reputation, and a suitable person to be entrusted with the sale of cigarettes, to issue a license upon the filing of the bond. The Court said:

"The case principally relied upon by the plaintiff in error is that of Yick Wo v. Hopkins, 118 U. S. 356, relating to the regulation of laundries in the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places for carrying on a laundry, with reference to the competency of the persons applying or the propriety of the place selected. It was also held that there was a clear and intentional discrimination made against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and

unjust. . . . Such an ordinance, so executed, was held void by this court. Speaking in that case of the general right to grant licenses in regard to occupations or trades, Mr. Justice Matthews, in delivering the opinion of the court, said:

"'The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies, to grant or withhold licenses to keep taverns or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.'

"The ordinance in question here does not grant to the mayor arbitrary power, such as is described in the above-mentioned laundry case, but the provision is similar to that mentioned in the foregoing extract from the opinion in that case. In the case at bar the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be entrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance as a security that he will faithfully observe and obey the laws of the State and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judicial nature by him."

Under Section 218 the Commission is not bound to grant the authority to any applicant, no matter what showing the applicant may make. The Commission may or may not refuse any application. Its power is as clearly arbitrary as was the power of the board of supervisors under the ordinance involved in Yick Wo v. Hopkins.

In Yick Wo v. Hopkins it is stated that rights are secured by the Constitution so that this may be a "government of laws and not of men," but the Court of Appeals declares that Section 218 "prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people and decide when and to what extent a greater charge might be made for a short than for a long haul, with full power" to suspend the section. It is true the Court said the Commission "might" do this "as the public interest and the ends of justice may require," but this Court in the case last cited declined to concur in a much more explicit statement of the Supreme Court of California touching the just principles that should govern the board of supervisors in the execution of the laundry ordinances, and said:

"They seem intended to confer, and actually do confer, not a discretion to be exercised under a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons."

Under Sec. 218, as construed by the Court of Appeals, this arbitrary power over an ordinary and essential branch of railroad business enables the Railroad Commission, without judicial restraint, to dis-

criminate between different carriers or shippers in a way in which the State itself could not discriminate. It would not be competent for the State to permit one railroad company to engage in competitive traffic and to prohibit another, similarly situated, from doing so. Nor could the State authorize one mine to ship its surplus coal to Louisville and withhold such authority from another mine similarly situated. Such acts on the part of the State would work a denial of the equal protection of the laws, which would be in contravention of the Federal Constitution. Yet the Railroad Commission would have full power to do these things free from any control.

Not only the rights of carriers to engage in perfectly legitimate and extremely valuable branches of traffic are thus put absolutely at the will of the Commission, free from guidance or restraint, but the rights of other extensive business interests are put even more completely at the mercy of this tribunal. Especially is this true with respect to coal mines in Kentucky, as their ability to continue in business at all is largely, if not entirely, determined by the ability to get their coal to the Louisville market. The facts offered to be proved by the coal operators who testified below demonstrate very forcibly the absolute dependence of that industry upon the Railroad Commission of Kentucky if this arbitrary power in the premises be confirmed by this Court. (Transcript, pp. 56–76.)

The arbitrary power condemned in Yick Wo v. Hopkins would, of course, have been condemned just as emphatically if it had been conferred by the Constitution of the State instead of by a municipal ordinance, for this Court was bound by the holding of the State court, that the Board passing the ordinance had power under the Constitution of the State to do so. If it had such power, it had just as much power as the Constitutional Convention itself would have had. It may be that the Court will be more reluctant to condemn a provision in Constitution than a provision in a municipal ordinance; but that reluctance will certainly not exist in a case like this, where the Court is not called upon to condemn any thing in the Constitution, but simply a palpable misconstruction, by four out of seven judges, of the provisions of the Constitution.

If competitive traffic, such as is shown by the record in this case, and such as we claim to be legitimate within the limitations above defined as legitimate traffic, is legitimate traffic which railroad companies are entitled to enjoy, subject only to reasonable and just regulations, the mere fact that such traffic is only a part and not the whole of the Railroad Company's traffic gives the State no greater right to impose arbitrary and unjust prohibitions or regulations in regard to it than it would have with respect to the whole traffic of the Railroad Company. In Smyth v. Ames, 169 U. S. 466, this Court quoted with approval from the opinion of the Circuit Court, responding to the suggestion that the total reduction under the act in question would be very small compared with the total business of the Company, as follows:

"The fact that the State of Nebraska can reach only one-twentieth of the total earnings gives it no greater right to make a reduction in respect to that one-twentieth than it would have, had it the power

over the total earnings and attempted in them a like per cent of reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent, it is at least, *prima facie*, equally unreasonable to so reduce any single fractional part of such earnings." (p. 543.)

In People v. Gilson, 109 N. Y. 389, the Court of Appeals of New York declared invalid a statute prohibiting the giving of premiums with sales of food. The Court said:

"By the provisions of this act a man owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation. It is certainly lawful to sell (as in this instance) coffee. It is an article of food, and is now almost one of the necessaries of life to a large number of people. A person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the defendant in this case; and that while his profits on the same amount of coffee sold would be smaller than if he gave no presents, yet by the growth of his trade his income at the end of the year would be more than by the old method. This statute, if valid, steps in to prevent his adopting such a course to procure trade, and from it to secure an income and livelihood for himself and family. . . . It can not be truthfully maintained that this legislation does not seriously infringe upon the liberty of the owner or dealer in food products to pursue a lawful calling in a proper manner, or that it does not, to some extent at least, deprive a person of his property by curtailing his power of sale; and unless this infringement and deprivation are reasonably necessary for the common welfare, or may be said to fairly tend in that direction or to that result, the legislation is invalid as plainly violative of the constitutional provision under discussion."

Thus the statute was held void, though the right to give such premiums was a mere incident to a lawful business; but the right to engage in legitimate competitive traffic is much more an essential part of railroad business, at least in the State of Kentucky; it is an equally innocent way of "enlarging the amount of trade," and its prohibition is fully as remote from any legitimate exercise of the police power.

The case of People v. Gilson has been frequently followed, and numerous statutes have accordingly been declared void, not because they absolutely prohibited lawful trades, but simply because they hampered lawful trades by prohibiting, without adequate reason, certain desirable, but by no means essential, incidents of conducting those trades.

Ruhstrat v. People (Ill.), 57 N. E. 41.
State v. Dalton (R. I.), 46 Atl. 234.
Long v. State, 74 Md. 565.

To the same effect are:

City of Chicago v. Netcher (Ill.), 55 N. E. 707.
Ex parte McKenna (Cal.), 58 Pac. 916.

IV.

The opinions of the Court of Appeals give no reasons whatever to justify the arbitrary effect which that court has given to the prohibition of Section 218, or the arbitrary power which it has given the Railroad Commission under the proviso thereto.

The Court announced that such competition as was shown in the record affected the policy or convenience of the carrier only, and that the general public was not concerned with it. If so, it is remarkable that the Constitutional Convention gave the Railroad Commission the power, at its will, to suspend the constitutional prohibition in cases of this character, since no public interest was involved; but the fact is, as recognized by every other court and tribunal dealing with the question, that legitimate competition does affect and concern the public, and that the policy of the carrier is influenced thereby simply because the carrier is bound to recognize what controls the action of the commercial public.

The Court said that Section 218 was adopted because there had been general and unavailing complaint on account of low rates in favor of competitive localities and comparatively excessive compensation at non-competitive localities, and that there was no complaint of discrimination between localities where there was no competition; and, moreover, if there had been, the Court could have prevented it upon common law principles, but that the Court could not, in the absence of statute, prevent discrimination in favor of competitive localities. If the Court had the power to prevent unjust discrimination between two non-competitive localities, it certainly had the same power to prevent unjust discrimination between a non-competitive locality and a competitive locality.

But such complaints, if they existed, could only have been with reference to discriminations supposed to be unjust; and even if just discriminations had been complained of, that could not warrant their prohibition. Whatever justifiable complaint existed would have been fully remedied by giving to Section 218 its proper meaning. The meaning given it by the Court of Appeals can have no reasonable or legitimate relation to the prevention of unjust discrimination between localities.

The Court said also that the actual cost of transportation is not generally greater for the shorter than the longer distance, and that, therefore, less rates to longer distance points are generally unjust and inexcusable extortion. In this the Court shut its eyes to the conditions of railroad transportation, which have been recognized by practically every other tribunal dealing with the subject, and which are, indeed, a matter of common knowledge and understanding, and which, moreover, were affirmatively shown in the record then before it. (Transcript, pp. 41–54.)

These considerations were stated with striking terseness by the Circuit Court of Appeals for the Fifth Circuit in the case of Interstate

Commerce Commission v. W. & A. R. Co., 93 Fed. Rep. 83, as follows:

"If the competition at the longer distance points is real, and such as to affect rates, the carrier must accept those rates, or abandon the competitive traffic. If the competitive rates are something more than the additional cost of the movement of the traffic, it is to the interest of the carrier and to the interest of the public that the carrier should be allowed to compete for the traffic. The profit, however small, to the extent that it inures, increases the revenues of the carrier, and has a tendency to reduce local rates and to improve the local service. There may be a wide difference between a rate or amount of compensation that would give full remuneration for the service in carrying the competitive traffic, and that remuneration therefor which the competitive conditions will allow the carrier to receive. The full measure of reasonable remuneration to the appellees for the carriage of competitive freight to Atlanta would require a rate sufficient to pay not only the additional cost of moving the competitive traffic, but also that proportion of operating expenses, fixed charges, and reasonable profit to the owners of the carrier lines which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier. And that rate would doubtless be applied and enforced if the circumstances and conditions permitted it to be done. But, as no higher rate than a full compensatory one should be applied and enforced under the most favorable circumstances and conditions, it is manifest that it can not be applied to traffic that is subject to severe competitive conditions."

This quotation is simply a reiteration of the principle upon which every Federal Court, including this Court, has proceeded in dealing with questions arising under the long and short haul clauses, and which needs but to be stated to commend itself to the judicial mind.

The Court also suggested that if competition could justify a less charge for the longer haul, Section 218 would be scarcely effectual for any purpose, and that discrimination could continue to be made at the will of the carrier and without legal restraint. This is a manifest and inexplicable misconception. The proper construction of the provision would admit of no such consequence. It would effectually prohibit every instance of unjust discrimination between localities on the same lines, whether made under pretext of competition or otherwise, and at the same time would not prohibit the carrier's engaging in legitimate competitive business when so doing would not be injurious to the public. The prohibition of just discrimination and the consequent destruction of legitimate traffic can not be justified on the plea that such annihilation is necessary to the adequate prevention of unjust discriminations, especially when no such necessity exists.

But after attempting by these various arguments (and we have summarized all adduced by the Court) to show that the public interest demanded that such rates to competitive points should be prohibited, the Court tears down its whole argument by holding that the Constitutional Convention intended that the Railroad Commission might at its

will authorize the less charges which the Court has just tried to show are inconsistent with the public welfare. Clearly, if the Constitutional Convention had so regarded competitive rates, it would not have authorized the Railroad Commission at its will to grant permission to charge them. But not only does the Court thus destroy the reason for the construction which it gives the section, but it destroys the provision itself, for while the Commission is left at large by the section to grant or withhold the favor of less competitive rates simply according to its own will and without judicial control, still, if we assume that the Commission would act fairly and intelligently in the premises, then it must follow that if in one case they authorize the less competitive charge for the longer haul, they must do so in every other case of legitimate competition within the limitations above described, that is, where the local rates are simply the regular standard rates for that distance and not attacked as unreasonable, and where the less competitive rates are compelled by controlling and unavoidable competition, and are not so low as to inflict a loss upon the Railroad Company so that the rates to the local points are not increased, and the competitive point is given no advantage which it would not otherwise have. If the Commission should grant the desired relief in one case of such legitimate competition and refuse it in another, it would be guilty of the most flagrant unjust discrimination, which would be none the less unjust because there is absolutely no remedy for it under the construction adopted by the Court of Appeals. If, on the other hand, the Commission grants the relief in all such cases, then it restores the status which we insist is the legitimate status, and leaves the section prohibiting only what we admit it does and ought to prohibit, and thus destroys what the Court of Appeals says was the very purpose of the law.

The Court insinuated that the construction put by it upon Section 218 must be adopted, as otherwise railroad men alone would be allowed to fix rates, and no tribunal could review their decision; and that under any other construction of the section the rights of the public would be left to be determined by the Railroad Company alone. This assumption is absolutely groundless and extremely unfair. The Court was not asked to hold that the Railroad Company alone should fix rates or determine the rights of the public, or that its actions in those respects should be free from review. Not only was the right of reasonable regulation admitted to the fullest extent, but the very theory upon which the Railroad Company was proceeding necessitated, in every controverted case, the judgment of the Court upon all of the evidence introduced as to whether or not the facts constituted that dissimilarity of circumstances and conditions contemplated by the law; and the Railroad Company could only hope to succeed by satisfying the Court that the rate adjustment did not injure the non-competitive point.

Clearly, none of the Court's reasons tend to show any justification for the arbitrary interference with legitimate railroad business which results from its construction of Section 218.

The Court seemed to assume that the reasonableness of the rate for

the short haul was the paramount consideration, and said that a jury was no better qualified to pass on that question than a skilled commission. This, however, loses entire sight of the principle clearly established by this Court in Chicago, &c., R. Co. v. Minnesota, 134 U. S. 418, and uniformly followed since then, that the Railroad Company is entitled to a judicial determination as to rates prescribed for it by a commission. If in the future the Commission in the exercise of the unlimited power which it will have, under the Court's construction, should impose as the condition of the Railroad Company's engaging in competitive traffic the requirement that it should charge unreasonably low rates to intermediate points, there would be no possible way in which judicial protection could be had. If the Company acquiesce in the condition and reduce its intermediate rates to the unreasonably low basis, that, of course, would end the matter; if it did not acquiesce, it would be compelled to give up the competitive traffic. The Court of Appeals has expressly said that the courts can not control the action of the Commission. Either alternative, therefore, will leave the Railroad Company without any opportunity to invoke judicial protection.

The Court stated that no right of appellant had been invaded, because it had not presented its case to the Railroad Commission, and that if it did so the Commission "might" allow the rates to stand. But the matter had been presented to the Railroad Commission in pursuance of the procedure of Section 820 of the Kentucky Statutes, at least with respect to the Louisville traffic, and the Commission after investigation had not only refused to grant relief, but had taken steps to prosecute the Railroad Company. It is true the Commission intimated that the Railroad Company might be permitted to charge a less rate for the longer haul if it fixed such rate to Lebanon as met with the Commission's approval. The acceptance of this condition, however, would have left the Railroad Company's rates, as heretofore pointed out, absolutely in the control of the Railroad Commission without the possibility in any way of invoking judicial protection if those rates were unreasonably low; and the judicial history of this country shows that it is not unprecedented for railroad commissions to impose unreasonably low rates, even when their action is subject to judicial review and control; here the Railroad Company would either have to take without question such non-competitive rates as the Commission might give it, or give up its valuable competitive traffic.

As is apparent from the language of Section 218, as well as from the decisions of the Court of Appeals, the discretion vested in the Railroad Company is necessarily an arbitrary discretion, without any rule to guide the Commission or protect the carrier, and free from judicial control. If the carrier should apply to the Commission and the application should be refused, and should apply for redress in the courts, it would be a sufficient answer for the Commission to say, as was pointed out by this Court in the case of Yick Wo v. Hopkins, *supra*, that the law had conferred upon them authority to withhold their assent without reason and without responsibility. A refusal to grant relief upon a formal application would, therefore, put the injured

party in no better plight to assert his constitutional rights. The Court would be confined to holding either that the arbitrary power conferred upon the Commission is lawful, and therefore that the injured party is without relief, or that Section 218 is itself void by reason of its conflict with the Federal Constitution; and if void, it can not regulate the conduct of the Railroad Company or sustain the judgment herein.

To hold that there must be first an application to the Commission and a refusal by the Commission, would deprive a carrier of any opportunity to get relief. The carrier must conform to Section 218 until the Commission authorizes it to charge the less rate for the longer haul. If the Commission withholds such permission, then, since the carrier can not by judicial proceedings compel the Commission to act, it must keep on conforming to Section 218, or, in other words, must continue to submit to the Commission's will. It may be suggested that the Railroad Company could, after such refusal of the Commission, establish the lower rate nevertheless, and upon prosecution therefor show its constitutional right to engage in such competitive traffic; but can its right to engage in such competitive traffic be made any more constitutional by the Commission's refusal to allow it? Is not its right just as enforceable in the absence of action by the Commission? It seems absurd to say that a carrier has a right to engage in certain traffic upon certain conditions which the courts will enforce, but that the courts will not enforce it until the Railroad Commission has first condemned it.

The Court has before it here a case of undoubted legitimate competitive traffic which is important to the Railroad Company, and in which it has the right to engage without being arbitrarily compelled to reduce its intermediate rates, which are admittedly just and reasonable for the service performed, to a basis manifestly unreasonable, in the absence of any opportunity for a judicial investigation as to the propriety for such reduction. This right can not be confided to the aribitrary control of the Railroad Commission. The only control given to the Commission is purely arbitrary. To say that a Railroad Company must first invoke this arbitrary and unlawful power upon the part of the Railroad Commission before it can have any standing in court to maintain its constitutional rights, necessarily recognizes the right of control on the part of the Railroad Commission in the exercise of that arbitrary power. If the Commission can not rightfully refuse to grant permission to engage in the traffic in question, then the law would require a vain thing if it required such application. If the carrier has the right to be free from the arbitrary control of the Commission, then that right is violated when it is compelled to apply to the Commission for permission to do that which is in itself lawful.

This competitive traffic was enjoyed by the carriers long before Section 218 was adopted. If the constitutionality of that section can not be invoked until application to and refusal by the Commission, then Section 218 would at least work a destruction of all such competitive traffic during such period as might be necessary to or desired by the

Commission in making up its mind whether it would permit the resumption of such traffic; and, as there is no limit upon the time the Commission may take before deciding upon the application, such destruction might have been continued indefinitely before any opportunity, according to this theory, for the carrier to get the court to restore to it valuable rights thus taken from it.

But a most serious practical objection to requiring the carrier to apply to the Commission, and then, upon the Commission's refusal, to disregard that refusal and establish the lower rate for the longer haul, and upon the prosecution of such violation of the law to assert in court its constitutional rights, is that the penalties are such as to deter any carrier from adopting such a course. These penalties are from $100 to $500 for each shipment. Within a week or a month, and long before an indictment could possibly be tried, to say nothing of the greater length of time necessary to secure a final adjudication, the penalties for observing that rate would amount to hundreds of thousands of dollars. No carrier, therefore, would dare to establish a less rate for a longer haul without the permission of the Commission, for no matter how much it might believe in the righteousnes of its position, it could not be confident in any case that such position would be upheld by the courts. Therefore, for the courts to say to the carrier, "You must apply to the Commission and the Commission must refuse your application before we will give you any relief," is to permit the carrier's legitimate traffic to be destroyed, not only pending action by the Commission, but for all time, since the carrier can not afford to take the risk of raising any question by establishing the less rate regardless of the Commission's action; and, as above suggested, the carrier would logically be in no better position after such refusal by the Commission than it would be before, for after all it must stand or fall by the constitutionality of the section itself, and not by what the Commission may do, as the Commission's action is not subject to review by the courts.

It is true that in this case the question does arise upon an indictment, but that is because no carrier in Kentucky anticipated when the Constitution was adopted that any court would give it such construction as was adopted by the Court of Appeals, and, therefore, it was not thought that in continuing to make the less charge to competitive points under such circumstances as are shown in this record there could be any violation of the law. Unless the section be held unconstitutional in this proceeding, then the result is that all carriers must conform to it as construed by the Court of Appeals. If it can not be declared unconstitutional here, then no case will arise where it can be declared unconstitutional, and the rights of the carriers in Kentucky with respect to this valuable and perfectly legitimate competitive traffic will for all time be absolutely subject to the arbitrary power of the Railroad Commission, and, with respect to that legitimate branch of their business, the carriers of Kentucky will be tenants at will under the Railroad Commission, and this material right, essential to the enjoyment of their property, will be held at the mere will of that tribunal.

V.

Section 218, as construed by the Court of Appeals, is an arbitrary interference with and an unreasonable restriction upon the legitimate business of common carriers. It completely destroys, subject to a purely arbitrary power of salvation in the Railroad Commission, a character of perfectly innocent traffic which is essential to the success of railroads in Kentucky, and a traffic in existence years before Section 218 was adopted.

The interests of the public generally do not require, but will be positively injured by, such interference. The section so construed is not reasonably necessary for the accomplishment of any purpose within the scope of the police power, and it has no reasonable relation to those objects.

The section, therefore, deprives the Railroad Company of its liberty to engage in a material and essential branch of a lawful business, and to use its property therein, and thus deprives it of its liberty and property without due process of law.

In thus interfering in the business of common carriers when all other lawful occupations are free from any unlawful imposition, it injuriously discriminates against common carriers in a way not justified by any principle of classification, and thus denies to them the equal protection of the laws, and it gives to the Railroad Commission arbitrary power and infinite opportunity to discriminate unjustly between different common carriers, without any possible opportunity for redress if the section itself is not held unconstitutional.

The Railroad Company is operating its railroads, which were acquired by it upon the faith of the charter granted by the State of Kentucky authorizing it to engage in railroad business in the State of Kentucky. It, therefore, has a contract right to engage in such business, which necessarily embraces every legitimate branch of that business. If the State can destroy one legitimate branch of that business, it can destroy all branches of it, either one by one or altogether. While admitting to the fullest extent the power of the State to regulate in the reasonable exercise of the police power any business which the State has contracted to permit within its borders, the State certainly has no right to hamper any such business with unreasonable and detrimental restrictions which have no reasonable relation to the accomplishment of any object within the scope of the police power, and Section 218, therefore, with respect to the Railroad Company, impairs the obligation of its contract with the State of Kentucky.

VI.

The State of Kentucky admittedly has no power to place in the hands of its Railroad Commission the control of coal traffic from Jellico, Tennessee, to Louisville, Kentucky, and any enactment having that effect would be obviously void.

By virtue of the anomalous construction given by the Court to Section 218, which is directly contrary to the construction of precisely the same provision in the Interstate Commerce Act, the legitimate traffic to Louisville, Kentucky, from the coal mines in Kentucky, just over the State line from Jellico, Tennessee, is absolutely prohibited except so far as the Railroad Commission of Kentucky may permit its enjoyment. The coal mines in Kentucky and Tennessee being in the same coal field, and affected by precisely the same considerations, are entitled to and have always received the same treatment. To continue giving to coal mines in Tennessee the benefit of the Louisville market as a competitive market, while forced under the State law to close that market to the Kentucky mines, would be disastrous in its effects upon the Kentucky mines, and would give its immediate rivals in the trade an overwhelming advantage; just so far as the railroads might seek to avoid this unjust discrimination by withdrawing the competitive rates to Louisville from the mines in Tennessee, the Kentucky law would become a direct regulation of and serious interference with important interstate traffic, and the future of that traffic would depend absolutely on the action from time to time of the Railroad Commission of Kentucky. In many other instances, likewise, as shown by the record, this remarkable construction of the Kentucky law would tell upon interstate traffic. It would lead to a marked disturbance of the due relation between places in different States, which would be manifestly detrimental to the general welfare. While, if the regulation were a reasonable exercise of the police power respecting purely local concerns, such interference might be regarded as too remote or incidental to make the law obnoxious to the Federal Constitution as an interference with interstate commerce; still, when the regulation is not such a valid exercise of the police power, it seems proper to assign as an additional objection to it that it is an unwarranted interference with and disturbance of interstate transportation and traffic.

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APPENDIX.

Below are the opinion of the Court of Appeals, its response to the petition for re-hearing, and the dissenting opinion of Judges DuRelle and Burnam, in Louisville & Nashville Railroad Company v. Commonwealth of Kentucky, 20 Ky. Law Rep. 1380.

Opinion of the Court by Chief Justice Lewis:

Appellant was in the Marion Circuit Court, upon recommendation of the State Railroad Commission indicted for the offense of charging greater compensation for transporting property for a shorter than for a longer distance, the particular circumstances being thus stated: "The defendant . . . operating a line of railroad in this State, extending from Pittsburgh through said County of Marion and City of Lebanon, on September 8, 1894, . . . did transport a car load of coal from Pittsburgh to Lebanon on said lines for J. M. Shreve, and unlawfully charged and received from him as compensation therefor $40.30, being at the rate of $1.55 per ton, when for transportation of a similar car load of coal under similar circumstances and conditions for a longer distance over the same line of road, namely, from Pittsburgh to Louisville and to Elizabethtown in the same direction, the distance from Pittsburgh to Lebanon being shorter, and included within the longer from Pittsburgh to Louisville, and to Elizabethtown, said defendant at said time did charge and receive less compensation than $1.55 per ton from various persons at Louisville and Elizabethtown, defendant at said time not having been authorized by the Railroad Commission of this Commonwealth to charge less for a longer than for a shorter distance for transportation of coal, etc."

As determination of the question of sufficiency of the indictment, also of other legal questions that arose during trial of this case in the lower court, depend upon construction to be given Sec. 218 of the Constitution and Sec. 820, Kentucky Statutes, they are here copied entire:

Sec. 218. "It shall be unlawful for any person or corporation owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind *under substantially similar circumstances and conditions* for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier or person or corporation owning or operating a railroad in this State to receive as great compensation for a shorter as for a longer distance: *Provided*, that upon application to the Railroad Commission such common carrier or person or corporation owning or operating a railroad in this State may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the trans-

portation of passengers or property, and the Commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation owning or operating a railroad in this State, may be relieved from the operations of this section."

Sec. 820. "If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind *under substantially similar circumstances and conditions* for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, such person shall for each offense be guilty of a misdemeanor and fined not less than one hundred, nor more than five hundred, dollars, to be recovered by indictment in the Franklin Circuit Court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on business. Upon complaint made to the Railroad Commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the Commission to investigate the grounds of complaint, and if after such investigation the Commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the Commission after investigation fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order it shall be the duty of the Commission to prescribe a statement of the facts, together with a copy of its order, to the grand jury of any county the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the Commission shall use proper effort to see that such company or carrier is indicted and prosecuted."

It is made ground of demurrer that Section 820, under which the indictment was found, is inconsistent with Section 218, and therefore invalid, because there is omitted the proviso contained in the latter. But as that proviso is self-executing, and gives to the carrier immediate right to make the application therein mentioned, and to the Commission full power to act upon it when made, iteration of it in the statute was needless. Certainly Section 820 does not at all interfere with the exercise of either the constitutional right of the carrier or constitutional power of the Commission. On the contrary, it contains the additional provision that even without previous application by the carrier the Commission may, after investigation made upon complaint by another of violation of that section, exonerate such carrier from operation of its provisions.

Another ground of demurrer is that the indictment embraces two distinct offenses, "one the charging of a less rate to Louisville than to Lebanon, and the other of charging a less rate to Elizabethtown than to Lebanon."

A statement in the indictment that *greater* compensation in the aggregate was charged and received from J. M. Shreve for transportation of coal from Pittsburgh to Lebanon than was charged and received from various persons for transporting coal from Pittsburgh to Louisville and Elizabethtown would have been more apt; but the statement as made does not vitiate the indictment or involve accusation of more than one offense. Neither Section 218 nor Section 820 was intended to fix or limit the general rate of compensation for transporting persons and property, but specially to inhibit greater or as great compensation in the aggregate for shorter as for longer distances. So, whatever may have been the amount actually charged and received for transportation of coal from Pittsburgh to Louisville and Elizabethtown, the alleged offense was not nor could not be completed until there was charged and received from J. M. Shreve greater compensation for transporting coal from Pittsburgh to Lebanon, which consisted of a single act and involved a single offense.

The criminal code requires an indictment to describe and identify an offense in terms so direct and certain as to apprise the defendant of the accusation on which he is to be tried, and to make the verdict and judgment rendered available as plea in bar of a subsequent prosecution for the same offense. It was therefore necessary in the present indictment, as was done, to designate the person to the wrong and injury of whom the alleged offense was committed, and to state that the recited amount of compensation charged and received from him, on or about a specified date, for transportation of coal the described shorter distance was greater in the aggregate than the amount then being charged and received from various or divers persons for transportation of same kind and quantity of coal the described longer distance.

But it was not necessary to state the precise amount charged and received for such longer distance, because the fact it was exceeded by or was less than the specified amount charged and received in the particular instance for the shorter distance had been already sufficiently alleged. Nor was it necessary to designate any particular person or persons, probably numerous, than whom Shreve had been charged and required to pay greater compensation; for Section 218 was intended to prevent discrimination rather between localities than between persons. So in order to convict of an offense like the present, it suffices to state in the indictment that the specified amount charged or received for the shorter distance was greater than that charged or received from persons generally or usually for the longer distance, and to support the allegation by the carriers' published schedule of rates, or other competent evidence of the fact.

There was also a motion made in the lower court to set aside the indictment because it does not contain a statement the Railroad Commission, after investigation of the complaint that Section 820 had

been violated by appellant, made the required order refusing to exonerate it from operation of its provisions. Assuming for the present that such investigation, and order following it, must in every case precede an indictment under that section, we think the allegation made on the subject sufficient; and consequently the motion was properly overruled.

The facts stated in the indictment as constituting the offense charged were on the trial proved or admitted. But all testimony offered for the purpose of showing existence of competition at Louisville and Elizabethtown between carriers of coal, or other facts affording reason or excuse, irrespective of cost of service, for charging or receiving greater compensation in the aggregate for the shorter than longer distance over appellant's road, was excluded; and all instructions to the jury hypothecated upon such facts were refused.

The following instruction showing the construction put upon Section 218 by the lower court was given: "That in determining whether two or more car loads of coal are transported under substantially similar circumstances and conditions where one is transported for a longer distance over the same line of road than for a shorter distance in the same direction, the shorter distance being included within the longer distance, they (the jury) should consider such circumstances and conditions as relate to the nature and character of the service by the defendant in the actual handling and movement of the coal transported."

Section 218, as will be observed, does not prohibit less *proportional* compensation being charged or received for the longer than shorter distance, but makes it an offense to charge or receive under substantially similar circumstances and conditions greater compensation *in the aggregate* for the shorter than for the longer distance.

It is proper here to consider the following part of that section: "But this shall not be construed as authorizing any common carrier, or person or corporation owning or operating a railroad in this State, to receive as great compensation for shorter as for a longer distance."

That particular provision, we think, was not intended to neutralize, nor could very materially affect what precedes it, for the difference between *greater* or *as great* compensation charged or received for transportation would ordinarily be too minute for calculation.

The main inquiry in this case is whether the words "substantially similar circumstances and conditions" were intended to relate to the actual cost of transportation, estimated with reference to necessary outlays and expenditures in carrying passengers and loading, moving and unloading freight trains, or to competition at particular places in the business of transportation, or other conditions affecting policy or convenience of the carrier only.

If attention be given alone to grammatical construction of Sec. 218, the words in question might possibly be made apply in either or all the conditions mentioned. But, attending to the sense of that section, which in character is both remedial and prohibitory or restraining, and manifestly intended to conserve mutuality of rights and duties between parties to the contract of carrying, and prevent wrong by one

to the other, the natural conclusion would be the words were designed to relate exclusively to the cost of service, for with that is the general public as well as the carrier concerned.

And that legislative power exists to so regulate conduct of the business of a railroad corporation, including charges for transportation, as that those dealing with it be not wronged or oppressed, is unquestionable. For the chartered franchise and privileges of such corporation are always and can be granted only in consideration of public service to be rendered, and, of course, upon implied reservation of legislative power to inhibit at any time unjust discrimination between persons and localities.

But as the section seems to be not so plain to counsel as to preclude discussion, we will look to the reason for its adoption, always a sure guide to the meaning of law-makers.

As there existed in neither the former Constitution, nor statutes enacted under it, any provision of the character, scope, or purpose of Section 218, it was obviously adopted to prevent continuance of what was deemed a wrong hitherto committed with impunity by reason of a defect of the law. Therefore, nature of that wrong being ascertained, as may be readily done by recurring to facts of common occurrence and too widely known to escape judicial notice, that interpretation should be given which will "most surely advance the remedy and suppress the mischief."

For many years prior to adoption of the present Constitution there had been general and unavailing complaint of discrimination by railroad companies of this State respecting compensation charged and received, in favor of localities where existed competition in the business of transportation, and of comparatively excessive compensation being exacted at localities where, because there was not such competition, shippers were at the mercy of the carriers.

But it was argued substantially then, as here and now, that competition made such difference of circumstances and conditions as justified the discrimination complained of.

The legislature did not attempt to give relief. The Court, in absence of an express statute on the subject, and as long as the amount of compensation charged or received was within the charter limit, could not intervene to prevent a railroad company adopting, as matter of assumed business policy, rates to meet competition.

There was no complaint of discrimination between places on the same line of railroad where there was not competition. And if there had been, the Court was, upon common-law principles applicable to common carriers, empowered to prevent it, because such discrimination would have been wanton and without excuse of business policy or necessity.

It is thus made manifest the object of Section 218 was to remedy a defect of the law by thereafter disallowing competition, or other considerations affecting the carrier only, not the general public, as excuse for charging or receiving greater compensation in the aggregate for transporting persons or property in this State the shorter than longer distance. And it is based upon two propositions: First, that the

actual cost of transportation is not generally greater for the shorter than longer distance; therefore to charge and receive greater compensation in the aggregate for the former than latter is unfair and oppressive. Second, that it is contrary to usual business methods, and not to be assumed a Railroad Company would, even under stress of competition, reduce rates of compensation for transportation to and from competitive points so low as not to leave a reasonable margin of profit; therefore an excess of aggregate compensation for transportation to and from non-competitive points is generally an unjust and inexcusable extortion.

So if competition be held to constitute in meaning of Section 218 the real difference of "circumstances and conditions," the section, though deemed of such urgent importance as to be made part of the organic law, would be scarcely effectual for any purpose whatever; for there could not be an approach to similarity, but necessarily a complete *dissimilarity* of circumstances and conditions of the transportation of persons and property the longer distance, nearly always to and from a place where there is competition, and the shorter distance, nearly always to and from a place where there is not competition. Consequently discrimination in aggregate compensation between such localities could still be made at will of the carrier and without legal restraint.

It is farther contended that a railroad company should be permitted to vary rates of compensation regardless of cost of service, and even to extent of arbitrary discrimination between localities, in order to develop resources of the State and at the same time increase its own business.

Due estimate should be put upon advantages to society that have resulted from construction and will continue to result from extension of railroads; and due regard should be had to the rights and interests of carriers as well as of those who patronize them. But such considerations do not justify a wrong interpretation and a consequent defeat of the main purpose of Section 218. After all, the best guaranty of success by the company and benefit to the general public from operation of railroads is to abide by the law as it is and deal fairly, justly, and impartially with persons and localities.

It is true that for well-known reasons there can not be exact similarity of circumstances and conditions as respects proportional cost of transportation the longer and shorter distance, but there is ordinarily a substantial similarity as respects the actual cost. Hence Section 218 prohibits not greater proportional, but greater compensation in the aggregate being charged or received for the shorter than longer distance.

However, framers of the Constitution, aware of the impracticability of fixing unchangeably relative amount of compensation to be charged and received, or rules applicable in every case to the complicated and varying business of railroads, and of the injustice that might sometimes result from doing so, invested the Railroad Commission with power to authorize, in special cases, a railroad company to charge less for the longer than shorter distance; and to prescribe from time

to time the extent to which such company may be relieved from operation of Section 218. And Section 820, enacted in harmony with Section 218, provides that, after an order of the Commission exonerating a railroad company from operation of its provisions as to any special violation complained of, the company shall not be prosecuted on account of it. With such order the court can not interfere. But an order of the Commission refusing to exonerate makes the Company liable to prosecution. And the Court thus acquiring jurisdiction must of course determine proper construction of the two sections; for upon that, the facts being found, depends guilt or innocence in each case.

As already indicated, we think the lower court did not err in giving the instruction referred to, nor in excluding all evidence having no bearing upon the cost of transportation.

Counsel have cited Texas Pacific Railroad v. Interstate Commerce Commission, 162 U. S. 197, and Interstate Commerce Commission v. Alabama Midland Railroad Company recently decided by the Supreme Court of United States, in which construing Sec. 4 of the Interstate Commerce Act, substantially like Sec. 218, it was held that when difference of rates between two points of shipment is the ground of complaint, competition is a leading element to be considered, though in each case the Court was divided. The Interstate Commerce Act was intended to operate not within limits of a State merely, but between and through States. And whatever construction that high tribunal may put upon Section 4 of that act, we, in exercise of the province belonging to the Supreme Court of each State to construe its own laws, have endeavored to so construe Section 218 as not to kill it. And to strengthen the belief we have not misconstrued it; part of the dissenting opinion of Justice Harlan in the last named case is here quoted: "Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies, engaged in interstate commerce, when their interests will be subserved thereby—to build up favored centers of population at the expense of the business of the country at large. I can not believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result."

The judgment is affirmed.

Response of the Court to the petition for rehearing:

Willing to consider all that can be said by those who believe themselves injuriously affected by the opinion in this case, we have, in addition to the petition for rehearing filed by appellant as matter of right, permitted petitions filed in behalf of twenty or more Coal Companies.

It is urged as reason for withdrawal of the opinion that if the Railroad Companies be not permitted to make special rates to competitive points, shipments of coal mined in this State must cease. Though an argument drawn from hardship or inconvenience is usually more appropriately addressed to law-makers, it should, of course, have due weight with the Court in determining the proper construction of a law, meaning of which is doubtful or obscure; but never so much as to induce a construction that is absurd, defeats the evident object in view, or involves stultification of those who made it.

However, the argument in behalf of the Coal Companies, even if based upon entirely correct premise, is counterbalanced by the fact that while special rates to competitive points may benefit a particular industry, removal of all restraint upon discrimination by Railroad Companies might be injurious to other industries and interests connected or identified with non-competitive points.

Conceding the construction we have been, by a sense of duty, constrained to give Section 218 will work injury to the coal industry of this State, the Court is not authorized or permitted to afford relief by perverting the true meaning and thereby defeating the manifest object of the section. The needed relief must be afforded, if at all, according to and in the manner provided by the law itself, which will be hereafter considered.

Counsel for appellant, after stating it had for seven years relied upon construction of the long and short haul law, settled, as they say, by the Interstate Commerce Commission and certain Circuit Courts of the United States, permit themselves to use this language: "The Court of Appeals, now at this late day, *propose* to repudiate that construction and announce a construction which has never been announced by any tribunal with reference to the law from which our law was copied *verbatim*."

Counsel might, without much effort, have recollected that the Court of Appeals does never *propose* but finally *decides* the construction to be given such parts of the Constitution and statutes of this State as need construction; and can not be foreclosed or bound by the views in regard thereto by any other tribunal.

It is not true that framers of the Constitution adopted Section 218 with a view to a construction that had been put upon Section 4 of the Interstate Commerce Act, adverse to the one we have given Section 218. At that time there had been no decision of the question by the Supreme Court of the United States—the only tribunal empowered to construe Section 4 authoritatively and finally. It could, however, be said, if necessary, that prior to adoption of our Constitution it had been held by respectable English courts that cost of service constitutes the difference of circumstances and conditions,

in meaning of their statute on the same subject and similar in terms to Section 218.

The language of Section 218 plainly shows it was made part of the Constitution for the definite purpose of surely inhibiting railroad companies doing something they had previously done at will and discretion; that is, charging and receiving greater compensation in the aggregate for transportation of passengers and property the shorter than longer distance. But if competition at particular localities in the business of transportation, or other circumstances or conditions influencing the common carrier, not affecting the general public, be held by this Court a sufficient reason or excuse for discrimination, railroad companies may, without legal restraint or interference, continue to do precisely what they did before Section 218 was adopted, and it becomes a dead letter.

In order to give meaning and effect to that section, cost of service must be held to alone constitute the difference of circumstances and conditions which will authorize greater aggregate compensation to be charged or received for the shorter than longer distance of the same line of road. And as only to the extent of difference in the actual cost of transportation a difference of aggregate compensation may be rightfully charged or received, the general public as well as the carrier is affected thereby.

As counsel for appellant do not show or attempt to show in what manner Railroad Companies would or could be restrained or prevented from charging at will greater aggregate compensation for the shorter than longer distance, nor what possible purpose Section 218 would or could serve, if the construction they contend for be accepted, we need not consider their petition for rehearing farther.

It is argued by counsel for Coal Companies that the Court has and should exercise jurisdiction to revise an order of the Railroad Commission, refusing an application to authorize a common carrier, in special cases to charge less aggregate compensation for the longer than shorter distance of the same line of road.

Unquestionably framers of the Constitution contemplated probable existence of exceptional circumstances and conditions working hardship or injustice to the Railroad Company as well as particular industries or interests; and therefore recognized the justice and necessity of authorizing special rates to be given to competitive points in special cases. But the Constitution does not contain, nor would it have been practicable to put in it provisions applicable to every state of case that might arise.

The Railroad Commission was therefore created to meet the emergency, and was intended to be invested with full power to authorize or not in special cases less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from operation of the section. In our opinion the Court has not jurisdiction to either *compel* the Railroad Commission upon application of the common carrier or those interested in particular industries or callings to suspend or relax operation of Sec. 218, or, upon application of individuals or corporations

feeling aggrieved, to *prohibit* such suspension or relaxation in special cases. While the Commission is thus, and to that extent, free from judicial interposition, it can not of course nullify or except in special cases at all suspend operation of Section 218; and though the Railroad Commission be invested with this unusual power, it must be treated as a constitutional power with which the Court can not interfere.

The petition for rehearing is overruled.

Dissenting opinion by Judge DuRelle.

The provisions of law involved in this case are Section 218 of the Constitution and Section 820 of the Kentucky Statutes, as follows:

Constitution, Section 218: "It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance; provided, that, upon application to the Railroad Commission, such common carrier, or person, or corporation owning or operating a railroad in this State, may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operation of this section."

Kentucky Statutes, Section 820: "If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall for each offense be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin Circuit Court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the Railroad Commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the Commission to investigate the grounds of complaint, and if, after such investigation, the Commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant and the rail-

road or common carrier, and the same shall be published as a part of the report of the Commission; and after such order the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the Commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the Commission, and a copy thereof delivered to the complainant, and the railroad or common carrier, and the same shall be published as a part of the report of the Commission; and after such order it shall be the duty of the Commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the Commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

Without taking time in considering the question whether the statute is in conflict with the constitutional provision in that it makes no provision for application to the Railroad Commission *by the carrier* for authority to charge less for the longer than the shorter haul in special cases, which was the evident intention of the Constitution, but provides only for a complaint *against the carrier* for a violation of the provisions of the statute, or the question whether the indictment is defective, I wish to call attention to the fact that Section 218 of the Constitution is taken almost *verbatim* from Section 4 of the Interstate Commerce Act.

Our Constitutional Convention adopted the long-and-short-haul section at its session closing April 11, 1891. At the time of its adoption into our Constitution that section had been construed by two United States Circuit Courts, and by the Interstate Commerce Commission, it being held that "substantially similar circumstances and conditions" did not mean solely the cost of carriage, but included also real competition, which the carrier might meet by reduction of rates to the competitive point, without making application to the Commission for authority. I attach little importance to the extracts given in the arguments from the Constitutional Convention debates as a means of ascertaining the intent of the provisions adopted; but, in this case, those extracts show that the attention of the Convention was called to the fact that, under the Interstate Commerce Act, a less charge for the longer haul was permitted when there was river competition at the more distant point. Under the well-settled rule of construction, the Convention must be assumed to have had those constructions in mind when they adopted the section. Those constructions have been followed with strict uniformity in this country, to say nothing of the English authorities, the cases adversely decided having been reversed, with an apparent exception in the Social Circle case. That case was decided by the Commission upon the ground, in substance, that there was no competition. The Circuit Court dismissed the bill on the ground that the transportation for the two hauls was not over the same line. The Circuit Court of Appeals reversed the Circuit Court without delivering an opinion, and the Supreme Court (162 U. S.

184) held the decision of the question unnecessary and declined to decide it.

In the case at bar it was shown that there was a substantial difference in the mileage cost of transportation of coal from Pittsburgh, Ky., to Louisville as compared with its transportation to Lebanon, for the reason that the greater volume of traffic in coal and other freight to Louisville made it possible to haul the Louisville freight in through trains, loaded to their full capacity, and without delay, while the traffic to Lebanon, by reason of its smaller volume, was necessarily transported in local trains, which is more expensive. It was shown, also, that the coal destined to Elizabethtown could be handled in the through trains as far as Lebanon Junction, which was the end of a division and only twelve miles from Elizabethtown.

The appellant company was not permitted to prove that the transportation of coal from Pittsburgh and all the mining section of southeastern Kentucky to Louisville was not only affected, but controlled, by competition at the latter point, which did not exist at all at Lebanon. This competition was from West Virginia and Pennsylvania coal, brought in barges down the Ohio to Louisville by the cheapest known method of transportation. The cheapness of its transportation gave Pennsylvania and West Virginia coal control of the Louisville market, and no other coal could be sold there, unless the transportation rates were made so low as to enable it to compete with the coal from those States. Neither the southeastern nor the southwestern Kentucky coal fields could reach the Louisville market at all but for the very low rates of transportation given to Louisville over the Kentucky railroads; and if those rates can not be given, Louisville must depend entirely for coal upon West Virginia and Pennsylvania, or upon the mines of other States, which, under the Interstate Commerce Act, can obtain low through rates to competitive points across this State. No injustice from low through rates to Louisville resulted to Lebanon or other intermediate points, for the rates to those points would have been the same, and the cost of coal probably higher, if the southeastern Kentucky coal could not have been carried to Louisville.

The majority opinion is, in effect, that cost of transportation is the only circumstance or condition that can be considered. If that be so, it is strange that more apt words were not used in the Constitution. The words used are certainly susceptible of a far wider significance. In my view, the section quoted left the railroads in the same condition, and with the same rights, as before its adoption, except in so far as something is expressly forbidden to be done. As said by Judge Jackson (then Circuit Judge) in a case afterward affirmed by the Supreme Court, and twice subsequently quoted with approval (162 U. S., pp. 184 and 197):

"Subject to the two leading prohibitions, that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage, or subject to undue preference or disadvantage persons or traffic similarly circumstanced, *the*

act to regulate commerce leaves common carriers where they were at common law, free to make special contracts looking to the increase of their business; to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits." (Interstate Commerce Commission v. B. & O. R. Co., 43 Fed. Rep. 37.)

In the case of the Mo. Pac. R'y Co. v. T. & P. R'y Co. (31 Fed. Rep. 862), it was said:

"Nor can it well be denied that, as between the short and long haul, competition may exist to that extent that what would otherwise be similar circumstances and conditions will be dissimilar circumstances and conditions."

In *ex parte* Koehler (31 Fed. Rep. 315), the Court said:

"Freight carried to or from a competitive point is always carried under 'substantially *dis*similar circumstances and conditions' from that carried to or from non-competitive points. In the latter case the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than a short one. When each haul is made from or to a non-competitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is willfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case the circumstances were altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or, as was said in *ex parte* Koehler, 'abandon the field and let its roads go to rust.'"

In I. C. C. v. A., T. & S. F. R. Co. (50 Fed. Rep. 295), the Court said:

"If the circumstances and conditions are not substantially similar, the prohibition imposed by the statute does not apply at all."

. . . . . .

"The common carrier can not be required to ignore or overcome existing differences in the transportation facilities of different localities, created not by its own arbitrary action, but by nature or by enterprises beyond its control."

In the case of Behlmer v. L. & N. R. Co. *et al.* (71 Fed. Rep. 835), decided by the U. S. Circuit Court for the District of South Carolina, January 22, 1896, the Court quoted from Judge Cooley, *in re* L. & N. R. Co., 1 Interstate Commerce Com. R. 57, as follows:

"The charging or receiving greater compensation for the shorter than for the longer haul is sure to be forbidden only where both are under substantially the same circumstances and conditions. And, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated."

This is quoted with approbation by the United States Circuit Court, Southern District of California (Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 50 Fed. 295):

"When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? Judge Cooley, in the same case, answers this question:

"'Among other things in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition were to continue. *And water competition was, beyond doubt, especially in view.*

. . . . . .

"The Interstate Commerce Law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade."

And see I. C. Com. v. Ala. Mid. R'y Co., 69 F. R. 227, and 74 F. R. 715.

The doctrine of these cases has been followed by the Supreme Court of the United States in the recent case of Interstate Commerce Commission v. Alabama Midland R'y Co., decided November 8, 1897. Said the Court in that case:

"The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission *or the courts* from taking that matter into consideration."

The Supreme Court expressly states the conclusion that in complying with the provisions of the third and *fourth* sections of the act, *competition which affects rates is one of the matters to be considered.*

The Court further holds that where the circumstances and conditions of the long haul and short haul are substantially dissimilar there is no necessity for the railroad company to apply to the Commission for authority to charge less for the long haul than for the short haul.

Of course, whether actual competition exists is a question of fact depending on the matter proved in each case.

It is legitimate to consider a question of State policy as tending to show what was intended by a law, whether a provision of the organic law or a statute. Not that we should decide a case upon what we think the proper policy to pursue; but we may consider the policy which the law-givers had in view as indicating what is the meaning of their enactment. Surely, the framers of our Constitution did not intend to cripple or destroy a growing industry of the State. But the construction by the Supreme Court of the Interstate Commerce Act, which is the same which was given it at the time it was copied into our Constitution, and the construction now given to our Constitution by the majority opinion, directly the reverse of that which prevailed when the instrument was adopted, work together to accomplish that end. Under the law, as laid down by the Supreme Court, it is perfectly lawful for the appellant company,

transporting interstate commerce, in order to meet the Ohio River competition at Louisville, to carry coal from Jellico, Tenn., to Louisville at a lower rate than it charges from Jellico, Tenn., to Lebanon, Ky. Under the majority opinion, it can not carry coal from Jellico, Ky., to Louisville at a less rate than it charges to Lebanon. If, therefore, it be true, as claimed, that the low through rate given to the competitive point is not sufficient to pay the cost of transportation, taking into consideration the fixed charges of the railroad—interest on debt, official salaries, etc., it follows not that the rate to Lebanon and other non-competitive points will be lowered, but that the through rate to the competitive point (Louisville) must be abandoned. The appellant will, therefore, be precluded from transporting Kentucky coal to the greatest market for it, and the mines shipping from Tennessee will have the benefit of Louisville as a market for their surplus, without any competition from Kentucky points. It appears that the Louisville market is almost indispensable to the successful working of the Kentucky mines. Giving access to that market by a through competitive rate works no injury to Lebanon, or to any other non-competitive point, but is a benefit in which Lebanon and other points indirectly share. To deprive the Kentucky mines of that benefit will profit no one except the miners of other States, which will thereby secure a monopoly of the Louisville market.

But without considering the authorities, and without considering what the Constitutional Convention ought to have intended, and doubtless did intend, as a matter of policy, for the interests and industries of the State, the language of the enactment shows beyond question what was the object intended to be effected by this provision of the Constitution, and in what way was that object to be effected. It was made unlawful for the carrier to charge a greater compensation in the aggregate for transportation of passengers or property for a shorter than for a longer haul, over the same line in the same direction, the shorter being included in the longer distance, if such transportation be made under substantially similar circumstances and conditions; but in the prohibition of a greater charge for a shorter distance it was provided that unconditional authority should not be given by implication to make as great a charge for a shorter as for a longer haul. It is, therefore, unlawful to charge as great a compensation for a shorter as for a longer haul, when the shipments are made under substantially similar circumstances and conditions. But even where the shipments are made under substantially similar circumstances and conditions, and where the carrier would, therefore, be confessedly guilty of violating the section if more were charged for the shorter than for the longer haul, on application to the Commission he may be authorized to make less charge for the longer haul, and the Commission may prescribe the extent to which he may be relieved from the operation of the section.

When charged with a violation of the law, the carrier may answer, first, that the shipments were not made under substantially similar circumstances and conditions, but under cir-

cumstances and conditions materially different; or, second, confessing the circumstances and conditions to be substantially similar, the carrier may answer that application has been made to the Commission, and authority given by it to make the less charge for the longer distance. If the circumstances and conditions of shipment are materially dissimilar, the law does not apply at all, and there is no need to be relieved from its operation by the Commission.

In this case the *appellant admits that it has* charged a greater sum for the shorter than the longer haul, but claims that the shipments have not been made under substantially similar circumstances and conditions; and has undertaken to make good its defense, by showing, first, the greater relative cost of the short haul makes a substantial dissimilarity, and, second, by offering to show that, by reason of competition from the Ohio River and from other railroads at Louisville, the shipments to that place have not been made under circumstances and conditions substantially similar to those which apply to a shipment to Lebanon. The testimony as to the cost of carriage is admittedly competent. The question presented here is, whether proof that Louisville is a competitive point and Lebanon is not is competent to show that the circumstances and conditions are dissimilar.

I have said that where the circumstances and conditions are dissimilar, the law, under its own terms, does not apply; but this is to be taken with some modification. Because a less charge is allowable under the act for a longer distance than for a shorter, on account of a less cost, it does not follow that the act loses its application entirely. The proper construction is, that the less rate is allowable only as it is in proportion to the less cost. The cost might be very little less for a longer haul, and yet the charge made be materially less, in which case the act would apply, because the less charge would not be justified by the less cost, and would clearly be the result of an unjust and arbitrary discrimination. And so if it appear that a point is a competitive one, it does not follow from that fact alone that the law is not applicable. It must also appear that the less charge is induced solely by the competition, or by it and the fact that the cost is less; otherwise, under pretense of less cost of shipment and alleged competition, the carrier might charge the less price arbitrarily, and solely because of a desire to favor one locality over another.

When the real purpose of the provision is considered, it seems plain that its enactment was not at all for the purpose of enforcing reasonable rates of transportation, a matter which is provided for by other statutes and by the common law. That is clearly not the purpose of this enactment, because, if the charge in this case had been $1.56 from Pittsburgh to Louisville, the rate from Pittsburgh to Lebanon being $1.55, no one would have dreamed of invoking the aid of the provision under consideration to effect a reduction of the rate to Lebanon; nor could it be invoked if the charges had been $2.00 to Lebanon and $2.10 to Louisville. The enactment, therefore, does not prohibit the carrier imposing any rate it desires, so long as a less rate in the aggregate is not charged for the longer than for the shorter haul. Clearly, the only purpose was to

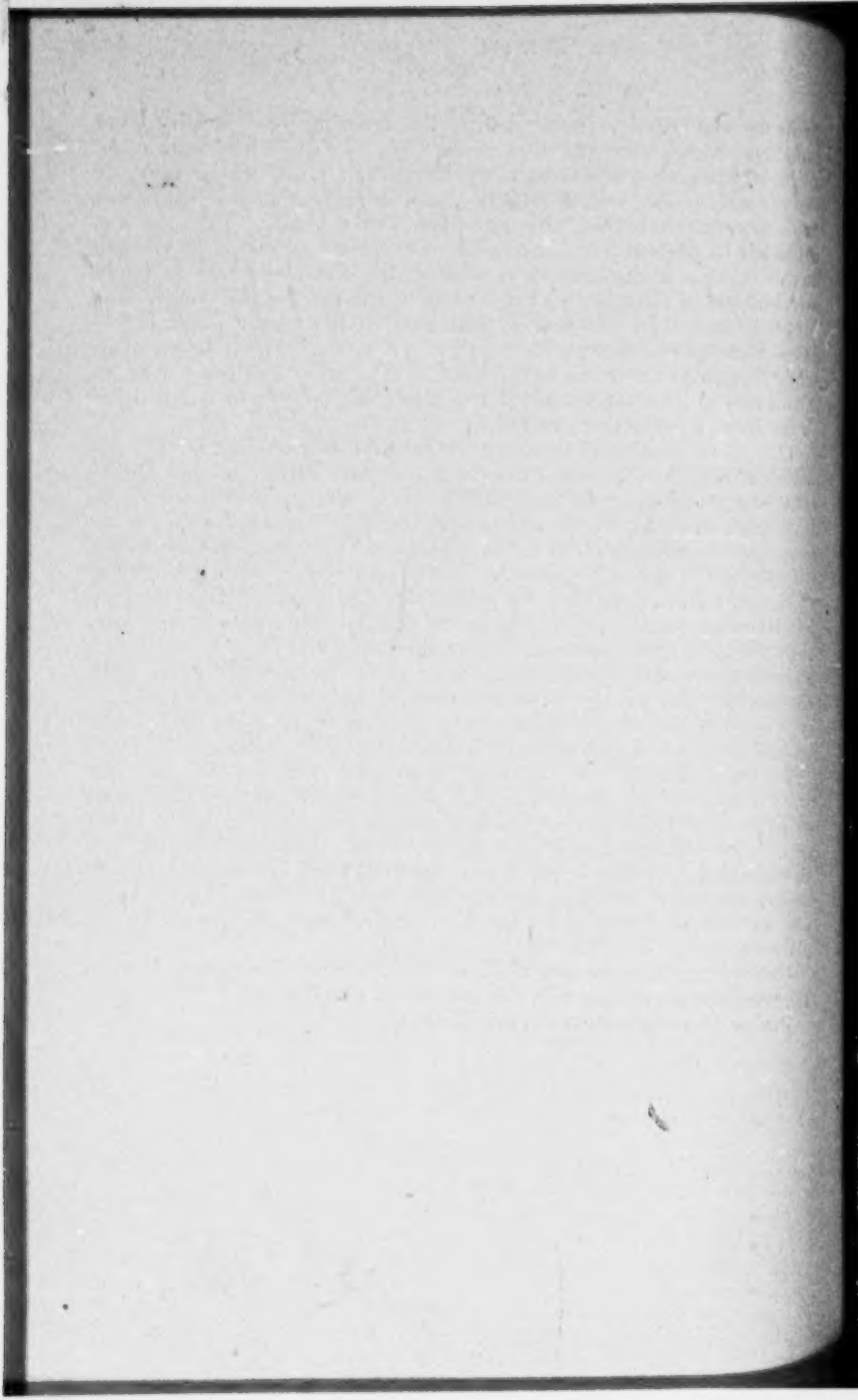
prevent the carrier from arbitrarily favoring one locality over another. Complaint had been made that, by discrimination in rates, railroad companies would build up towns and cities where they, or their management, owned property; and to prevent such injustice and arbitrary discrimination this provision was enacted. The act was intended to prevent the building up of favored centers of population at the expense of the country at large. But if the less rate is fairly attributable to the fact that the cost of shipment for the longer distance is less than the cost of shipment to the nearer point, it follows that the difference in charge is not attributable to an arbitrary design to favor one locality at the expense of another. And so if the less rate for the longer haul is fairly attributable to competition in business by water or otherwise.

The act of arbitrarily favoring one locality over another is that act which it was the purpose of the Constitutional Convention and Legislature to condemn. But if the difference in charge is attributable to legitimate motives, *that is, any motive other than that condemned by the law,* then there is no room for the operation of the law, as that which it prohibits is not in fact done. To charge a carrier with a violation of this law is, in substance, to charge it with unjustly favoring one locality over another, by charging the favored place with a less rate, though the shipment is for a longer distance; and it is a legitimate answer to say that the less charge was made for another cause than the one the law prohibits; and therefore, unless the law is one to regulate the cost of shipment or competition in business, the causes named may be shown to have induced the less charge.

It can hardly be claimed that the purpose of the law was to deprive Louisville of its low or competitive rate, or to attempt to place Lebanon in as favorable a geographical position as if it were situated on a large water-course. I think, therefore, that so long as Louisville is given only the benefit of its natural advantages, and only such low rates as flow from geographical position, it can not be said that there has been any arbitrary discrimination, to prevent which alone this law was adopted.

Conceding the force and vigor of the argument of the Chief Justice, I have been compelled to reach a different conclusion.

Judge Burnam concurs in this dissent.



No. 93.
Reply Brf. of Lindsay & Hines
Bruce for P. E.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 93.

Filed Nov. 21, 1900.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY TO BRIEF FOR DEFENDANT IN ERROR.

WILLIAM LINDSAY,
WALKER D. HINES,
Counsel for Plaintiff in Error.

H. W. BRUCE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... *Plaintiff in Error.*

VERSUS

COMMONWEALTH OF KENTUCKY, *Defendant in Error.*

Brief for Plaintiff in Error in reply to brief for Defendant in Error.

Throughout his brief counsel for defendant in error proceeds upon the assumption, which he reiterates in various forms, that plaintiff in error is contending for such a construction of the long and short haul provisions in question as will enable it to act as judge, jury, and legislature in its own case when its interests conflict with those of the public, and that this contention substantially amounts to a denial of the existence of governmental control in the regulation of railroads. On the contrary, we admit to the fullest extent that, as stated in L. & N. R. R. Co. v. Kentucky, 161 U. S. 677, corporations engaged in a public service are subject to legislative control so far as becomes necessary for the protection of the public interests.

Likewise, counsel for defendant in error assumes that the construction contended for by plaintiff in error would give it the exclusive right to decide for itself and the public what is reasonable, and the sole right of determining when competition exists. Yet our sole contention is and has been that if these long and short haul provisions were so construed as not to conflict with the Federal Constitution, the existence and character of competition would be questions of fact to be determined, when controversies arise, not by the railroad company but by the courts.

I.

Counsel for defendant in error on page 3 of his brief suggests that the Commonwealth was not called upon in the trial court to rebut or contradict the evidence offered by plaintiff in error, in as much as that evidence was properly excluded by the trial court. This, of course, begs the entire question at the outset, for that question is, was the evidence properly excluded? or, to state it in another form, are the constitutional and statutory provisions in question in conflict with the Federal Constitution when so construed as to result in the exclusion of that evidence?

On pages 5 and 6 of his brief counsel for defendant in error lays stress on the statement that there is no pretense that compliance by plaintiff in error with the constitutional provision would prevent its conducting its business so as to make a profit on the investment, and adds that, in every case where the attempted exercise of the power of legislative regulation of business affected with a public interest has been declared by this Court to be inoperative, it has been upon the ground that it was spoliation under the guise of regulation, or destruction rather than regulation. On page 12 he states that the legislative discretion can not be restricted unless in a particular case it is not an exercise of discretion, but the equivalent of confiscation.

In these assertions counsel confuses two entirely distinct inquiries. It is one thing to inquire whether a statutory regulation is *per se* in conflict with the Federal Constitution, because, as expressed in Lawton v. Steele, 152 U. S. 133, the interests of the public generally do not require such interference, or the means adopted are not reasonably necessary for the accomplishment of the purpose, and are unduly oppressive. It is quite another thing to inquire whether a statutory regulation, which is justifiable because required by the interests of the public generally, and which in general is fairly adapted to the accomplishment of the purpose, so operates in a particular case as to amount to spoliation

or confiscation. The case here is of the former character. Counsel's observations are pertinent only to cases of the latter character. In L. S. & M. S. R. Co. v. Smith, 173 U. S. 684, the Court held that the particular piece of legislation did not partake of the character of legislation fairly and reasonably necessary to attain any of the objects for which regulation might be employed, but was an undue interference with rights of the railroad company guaranteed by the Federal Constitution, and therefore held the statute void. This holding was not based upon the fact that the railroad company had shown that compliance with the statute would prevent all profit on its investment, nor that the statute amounted to spoliation or confiscation. The Court simply held upon the principle so well illustrated by the case of People v. Gilson, 109 N. Y. 389, that the statute was void because it was an unreasonable interference not fairly adapted to secure any legitimate public end.

We contend here that the Kentucky long and short haul provisions as authoritatively construed by the Court of Appeals of that State have no reasonable relation to, and are not fairly adapted to secure any legitimate end of police regulation, but that, on the contrary, they amount to a palpably unwarrantable interference with a perfectly legitimate branch of railroad business, and therefore that so long as those provisions are so construed by the courts of Kentucky they must be held to be in conflict with the Federal Constitution. The evidence introduced was simply to show the perfectly legitimate character of the traffic destroyed by that construction of the provisions, and to show the utter absence of any proper reason for upholding such construction as an allowable exercise of the police power. If we are correct in this contention, then the provisions must be held invalid, whether they in fact absolutely destroy the earning capacity of the railroads in Kentucky or not.

II.

On page 4 of his brief counsel for defendant in error, in justifying the construction put by the Court of Appeals upon Section 218 of the Constitution, insists that, as so construed, the section does not fix a rate, nor abridge the right of the carrier to charge a rate, that will be sufficient to secure a reasonable profit on its investment; that the fixing of the rates is left to the carrier under the general restriction that they must be reasonable, but that when a rate is fixed as reasonable to a longer distance point, then any excess over that rate for a shorter distance point is declared to be an unjust discrimination; or, as applied in the case at bar, if the carrier *for any cause* fixes as reasonable a rate of $1.00 per ton for the transportation of coal 147 miles, it shall not be heard to claim in any court that $1.55 per ton is reasonable for the transportation of coal for only 80 miles over the same route in the same direction. In illustration of his view, that this is a perfectly innocent form of regulation, counsel, in effect, indicates on page 8 of his brief that the State would without question have the right to require all charges to be in proportion to the mileage traveled.

These statements strikingly illustrate just the converse of the proposition in support of which they are adduced. It is well known that railway rates do not and can not increase in proportion to mileage, even when there are no exceptional competitive circumstances to interfere with their adjustment. Rates for very short distances are always very much more per mile than rates for long distances. If upon a given commodity the rate would be ten cents per hundred pounds for a distance of twenty miles, it would not likely exceed thirty cents for a distance of one hundred miles. If any statute should declare that railroad companies should charge at the same rate per mile on both short and long distances, that statute would necessarily be unconstitutional. It would either

require the transportation of freight for very short distances at rates unduly low, or it would absolutely destroy traffic for long distances by making the rates so high that the traffic could not bear them. Such regulation, moreover, would have no relation whatever to the promotion of the public welfare, and, instead of being a justifiable exercise of the police power, it would be an oppressive interference with the legitimate management of railroad business. It would be no more unreasonable to require that all classes of freight should be carried at the same rate per hundred pounds, which would result in ruinously low rates on high class goods or the utter destruction of low class traffic. It would be scarcely more unreasonable on its face, and perhaps less disastrous in practice, to require both passengers and any given class of freight to be carried at the same rate per hundred pounds.

With respect to conditions existing in the State of Kentucky, the long and short haul provisions of that State, as construed by its Court of Appeals, are, as counsel for defendant in error very properly assumes, quite analogous to the suggested requirement that all rates should be constructed on a mileage basis. Just as it is in all localities absolutely necessary to charge high rates per mile for short distance, and very much lower rates per mile for long distances, in order to conduct railroad business successfully, so in the State of Kentucky, where traffic is not dense, and where water competition is at many places very powerful, it is absolutely necessary to the successful conduct of the railroad business to charge higher rates on the ordinary local business of the railroads, and at the same time to accept less aggregate rates on long hauls when necessitated by competition. Precisely the same principle necessitates and justifies this course as necessitates and justifies the charge by railroad companies everywhere of higher rates per mile on short hauls than on long hauls, and higher rates on high class goods than on low class goods. While, of course, the element of difference in expense substantially enters into the two latter adjustments

more than in the other adjustment, yet the difference made between the rates per mile on short and long hauls, in the absence of competition, and in the rates on high and low class goods for the same hauls, are very much greater than could possibly be justified by any demonstrable difference in expense, and those differences in rates rest ultimately upon the same sort of commercial conditions as control the long and short haul charges involved in this case.

As counsel for defendant in error states, Section 218, as construed by the Court of Appeals, declares that if the carrier *for any cause* fixes a rate of $1.00 per ton for transporting coal from Altmont to Louisville, it shall not be permitted to charge $1.55 per ton for a shorter haul; in other words, the section absolutely prohibits giving any consideration to the most controlling cause affecting transportation, *i. e.*, competition. Plaintiff in error offered proof that the cause of its charging only $1.00 per ton from Altmont to Louisville was controlling and unavoidable competition, and that no such competitive conditions existed at Lebanon, and, therefore, that the charging of this low rate was not a criterion as to what would be a reasonable rate at Lebanon. Under the circumstances shown in the record the charging of $1.00 per ton to Louisville threw no more light on what was a reasonable rate to the non-competitive point, Lebanon, than the charging of $1.55 per ton on coal to Lebanon would throw upon the question of the reasonableness of a rate of ten or twenty times that much on high class merchandise for the same distance. In other words, Section 218, as construed by the Court of Appeals, selects what this record demonstrates is in this case a wholly immaterial circumstance and makes that the absolute criterion of what is a reasonable rate to Lebanon.

Plaintiff in error was prepared to demonstrate that the rate to Lebanon was reasonable and just. In the case of L. & N. R. Co. v. Commonwealth, 18 Ky. Law. Rep. 42, 35 S. W. 129, involving the reasonableness of the very same rate to Lebanon from a point near Altamont, under a statute prohibiting

extortion, the Court of Appeals had by the following language declared that rate to be legal:

> "It may be observed further, however, that it would seem singular if such a statute, even if in all respects valid, could be enforced against a carrier whose rates, as fixed in its charter, are in excess of the rates alleged to be excessive in the indictment. And this, not because such rates are secured by an irrepealable contract, a matter not now considered, but simply because they at least remain the legal rates until changed by law."

The result is that the section is made to prohibit either the continued enjoyment of a perfectly legitimate, innocent, and valuable competitive traffic, or to require the arbitrary, horizontal reduction of non-competitive rates, which the carrier was prepared to show were reasonable, and which the courts of the State had declared to be legal. An exactly similar statute has been held inoperative in cases of controlling and unavoidable competition, as pointed out in our originial brief, in Ex-parte Koehler, 23 Fed. Rep. 529. The same court in Ex-parte Koehler, 31 Fed. Rep. 318, 320, announced that the right to meet such competition by less charges than for shorter hauls was a common law right of the carrier. This case was referred to with approval by this Court in Interstate Commission v. Alabama Midland Railway Co., 168 U. S. 164.

It is submitted that any such absolute destruction of traffic essential to the railroad company's prosperity or any such arbitrary reduction of rates already admittedly legal can not be a means fairly adapted to securing either reasonable rates for non-competitive points or preventing unjust discrimination in favor of competitive points. The latter object was evidently the one had in view by the adoption of Section 218, as is fully recognized by the Court of Appeals in the case at bar. In its opinion the Court of Appeals, in pointing out the reasons for the adoption of the section, said it had been notorious that railroad managers had by discrimination in favor of certain shippers or a given

locality brought ruin to others, and that it was the aim of the Constitution to require the railroads to treat all fairly and with equality. (Transcript, page 83.) Yet, this object of preventing discrimination between localities would be fully secured, as is done under the Interstate Commerce Act, by prohibiting the less charge for the longer haul when it is not necessitated by controlling and unavoidable competition, or when it is lower than necessity requires, or when it is so low as to occasion an increase in what would otherwise be the rate to the non-competitive point. This would fully protect the rights both of the public and of the carrier.

The section was evidently not designed to secure reasonable rates *per se* to non-competitive points, or if it had such design, it can not for the reasons already pointed out be regarded as a means fairly adapted to that end, being in its nature perfectly arbitrary and rendering it impossible for the carrier to secure judicial protection if such reduction were unreasonable.

III.

It is so clear that the iron-clad prohibition of charging more for a short than for a long haul on railroads situated as are the Kentucky railroads would be a wholly unreasonable interference with the legitimate operation of those roads not relating to or promoting the public welfare, but working the greatest injustice and hardship to the railroads without the opportunity for judicial protection, that counsel for defendant in error virtually concedes (page 10 of his brief) that such an iron-clad rule would be unconstitutional because of the hardships resulting to the carrier, and to sustain the provision he practically relies exclusively upon the proviso giving the railroad commission authority to grant relief from such hardships. The opinion of the Court of Appeals in this case, and the opinion of that court in the former long and short haul case which it followed here, both show that it, too, regarded

an iron-clad prohibition as imposing unwarrantable injustice upon the railroad, and that it was just and necessary to provide relief therefrom, and regarded the proviso as affording this relief, and saving the provision from the constitutional objections.

Counsel for defendant in error admits throughout his brief what is very clear from reading the opinions of the Court of Appeals, that this authority in the railroad commission is exclusive and conclusive, that it is "a power not shared by Governor, courts or legislature." In the case of L. & N. R. Co. v. Commonwealth, 20 Ky. Law Rep. 1380, in which the federal questions were not raised, the Court of Appeals said: (See page 37 of our original brief.)

> "The railroad commission was therefore created to meet the emergency, and was intended to be invested with full power to authorize or not in special cases less compensation to be charged for the longer than shorter distance, and to prescribe from time to time the extent to which the common carrier may be relieved from operation of the section. In our opinion the Court has not jurisdiction to either compel the Railroad Commission upon application of the common carrier or those interested in particular industries or callings to suspend or relax operation of Section 218, or, upon application of individuals or corporations feeling aggrieved, to prohibit suspension or relaxation in special cases. While the Commission is thus, and to that extent, free from judicial interposition, it can not of course nullify or except in special cases at all suspend operation of Section 218; and though the Railroad Commission be invested with this unusual power, it must be treated as a constitutional power with which the Court can not interfere."

In the case at bar, which admittedly involved the same questions of construction as the case just cited, the Court said (Transcript, pp. 82, 83):

> "We are urged to overrule that case; but it was fully considered and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation."

Throughout its opinion the court treated the railroad commission as entirely independent of the courts.

It becomes necessary, therefore, to consider the arguments of counsel for defendant in error in support of the sufficiency of the proviso as thus construed to relieve Section 218 of the constitutional objections.

Apparently overlooking his virtual concession that Section 218 without the proviso would be unconstitutional, counsel for the defendant in error dwells upon the fact that the power exercised by the Commission is only for the benefit of the carrier, "does not increase the rigor of the law," nor "impose any burden upon the carrier." Since the prohibition of the section, as construed by the Court of Appeals, is as rigorous as a disregard of the practical and constitutional rights of the carrier could make it, and imposes upon the carrier all the burden the subject admits of, it is not strange that the ample powers of the Commission do not admit of additional impositions or rigor; but counsel clearly makes no progress in these observations in demonstrating the sufficiency of the proviso to relieve the section of its constitutional objections. It may be suggested, however, that in the unlimited freedom of the Commission to grant relief to one, and to withhold it from another, the Commission can in an indirect way impose the most grievous burden upon both railroads and localities by putting them at a disadvantage with others more favored by the Commission.

IV.

Counsel for defendant in error contends that the power of the Commission is not arbitrary, but is to be exercised only after investigation, and that this differentiates the case from Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418. He adds that the "command to investigate" on the carrier's application "necessarily requires of the Commission a full and fair consideration of every

fact and argument presented by the applicant that could affect the interests of the carrier and the public." (Page 11 of his brief.)

The proviso in question reads as follows:

> "Provided, that upon application to the Railroad Commission, such common carrier, or person, or corporation, owning or operating a railroad in this State, may in special cases after investigation by the Commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation owning or operating a railroad in this State, may be relieved from the operations of this section."

It might possibly be held that the commission would violate its duty if it granted relief from the section without investigation, although it seems to be given plenary power from time to time to prescribe the extent to which a carrier may be relieved from the operation of the section, without any accompanying requirement that it shall investigate the matter. But this requirement of investigation, so far as it goes, was evidently imposed for the protection not of the carrier but of the public. The investigation is required only in cases where the relief is granted, and if the relief be granted to the carrier, it is immaterial to him whether there has been investigation or not. There is no requirement that the commission shall investigate the applications which the carrier makes. In other words, there is not, as counsel for defendant in error assumes, any "command to investigate." The carrier may apply to the commission, and the commission may refuse absolutely to consider the application, and yet in no way violate its duty under the law. The Court of Appeals has nowhere said it was the duty of the commission to investigate upon application of the carrier. It is true the Court of Appeals said in this case,

> "It is the duty and no doubt will be the pleasure of the railroad commission to so regulate the matter that no injustice shall be done any industry in the State, and the true interests of the Commonwealth as a whole shall be promoted."

But this Court, in Yick Wo v. Hopkins, 118 U. S. 356, refused to be controlled by a much more specific declaration of the Supreme Court of California, and it is manifest that the language just quoted finds, as to what it says about the railroad commission's duty, no more support in the constitutional provision than it finds there as to what it says about the railroad commission's pleasure.

The fact is that under this proviso the railroad commission has full liberty to refuse to entertain any application that may be presented to it by any carrier.

In Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, the railroad commission was charged with the express duty of fixing equal and reasonable rates to be charged by the railroad companies. Here, at least, was a rule of action laid down to guide the commission; yet for reasons which will be discussed below, this Court held that the act as construed by the Supreme Court of Minnesota was in conflict with the Federal Constitution. Section 218, however, prescribes no rule of action to be observed by the commission, and indeed imposes no duty whatever upon the commission. It simply gives the commission the right, if it chooses to do so, to suspend the section without requiring it to entertain applications of carriers and without intimating when, or under what circumstances, or to what extent such suspension shall be granted.

If the section were so framed as that there were no imposition upon the railroad company until the commission had taken action, it might be easier to twist the word "investigation" in the proviso into some sort of protection for the carrier. It is not, however, the action, but the non-action, of the commission which imposes the burden upon the carrier, and there is nothing

in the section which gives the carrier the faintest suggestion of a right to set in motion any sort of machinery to put an end to the non-action of the commission.

Counsel for defendant in error, on page 9 of his brief, quite aptly likens the prerogative of the commission, under the proviso of Section 218, to the pardoning power of the governor and the power of the legislature to make exceptions in the laws, and complacently adds that, "in each case the result is final." A pardon is of course a matter of grace, and not of right; and so is the favor of an exception incorporated by the legislature in any of its enactments. It is undoubtedly true that the power of the railroad commission under this proviso is precisely of the same character. An unconstitutional restriction is imposed upon the carriers of Kentucky by Section 218, and then it is sought to escape the consequent invalidity of the section by pointing to a proviso which affords the carrier the probability, or, at any rate, the possibility, of securing gracious concessions from the railroad commission!

It is true that the procedure outlined in Section 820, Kentucky Statutes, does provide for notice and investigation upon complaint made to the Commission (without, however, laying down any rule to guide the Commission's action), but that procedure is a mere incident to the prosecution. The carrier is necessarily guilty of a violation of the Constitution before any complaint can be made under the statute. The Court does not even hold that the procedure outlined in Section 820, Kentucky Statutes, *must* be followed before the carrier can be successfully prosecuted for violating that section. In any event, that section does not affect the civil consequences of violating Section 218 of the Constitution, nor can the *carrier* in any case demand a hearing and investigation under Section 820, Kentucky Statutes, for obviously such hearing and investigation are to be only at the instance of some one complaining against the carrier.

After all, the provision which controls the carrier's conduct and forces it either to abandon its competitive traffic or to accept

without redress such conditions as the railroad commission may impose is Sec. 218 of the Constitution. The civil consequences alone of violating that section would compel compliance with it, regardless of any prosecutions. There is nothing in Sec. 820, Kentucky Statutes, which, according to any construction, lessens the practical effect of the absolute prohibition of Sec. 218 of the Constitution, or which imposes upon the railroad commission any duty to give the carrier a full hearing upon its application under Sec. 218 or to afford it relief in proper cases, or which in any way affects the absolute and uncontrolled power of the railroad commission thereunder.

It must, too, be constantly borne in mind that in dealing with these vital interests of the carriers of Kentucky in this final and conclusive fashion the commission would necessarily act according to its mere will, uncontrolled and undirected, and would thus have precisely the power condemned by this Court in Yick Wo v. Hopkins, 118 U. S. 356.

V.

But even if the proviso required the commission to entertain and investigate the carrier's application for relief from the unreasonable hardships of the section, and enacted some sort of rule by which the commission should be governed in granting or withholding relief, the proviso would still not afford constitutional protection to the carriers, because it would turn them over absolutely to the railroad commission without any opportunity at any time in any form to have any measure of judicial assistance in regard to or protection of the rights which are most vital to their existence.

Counsel for defendant in error takes the broad ground (page 7 of his brief) that all legislative power, all administrative power, and all judicial power, which the State of Kentucky may exercise in the regulation of common carriers, may be vested in the railroad commission if the organic law of the State

so provides, and from this premise he deduces the conclusion that the final and conclusive powers attributed to the railroad commission by the Court of Appeals under the proviso of Section 218 of the Constitution are not in conflict with the Constitution of the United States.

Section 27 of the Constitution of Kentucky is as follows:

> "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Section 28 of the Constitution of Kentucky reads as follows:

> "No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Section 109 of the Constitution of Kentucky reads as follows:

> "The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution."

The courts established by the Constitution, in addition to the Court of Appeals, are Circuit Courts (Section 125), Quarterly Courts (Section 139), County Courts (Section 140), Justices' Courts (Section 142), Police Courts (Section 143), and Fiscal Courts (Section 144).

Section 135 of the Constitution of Kentucky reads as follows:

> "No Courts, save those provided for in this Constitution, shall be established."

By Section 209 of the Constitution a commission was established to be known as "The Railroad Commission," to be

composed of three Commissioners. After providing for the method of their selection and the filling of vacancies, the section provides:

> "The powers and duties of the Railroad Commissioners shall be regulated by law; and until otherwise provided by law, the Commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed, and allowed by law to the existing Railroad Commissioners."

The Constitution of Kentucky did not establish the railroad commission as a court. At the time of the adoption of the Constitution the railroad commission was essentially a ministerial tribunal. (1 Acts 1881-2, p. 65.) After the adoption of the Constitution the legislature, in pursuance of its power preserved by Section 209, re-enacted the railroad commission law, and it was provided that the duty of the commission should be (Ky. Stats., Sec. 821)

> "To see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State."

Thus the railroad commission of Kentucky is essentially an administrative or ministerial tribunal, charged in that capacity with the supervision of the railroads of the State and with the duty of seeing that those railroads obey the laws. The railroad commission is not a court, and under the Constitution of Kentucky can not be made a court, and can not exercise judicial functions. But even if, notwithstanding the various provisions of the Constitution referred to, it should be held that the commission may exercise such judicial functions as are necessary to carry out the proviso of Section 218, since that is itself a part of the Constitution, the fact still remains that the commission is primarily and essentially an administrative tribunal. As such it is necessarily charged with duties and powers which, in the

nature of things, as viewed in the light of republican institutions, make it not a fit tribunal to be vested with final judicial powers of serious importance.

In Western Union Telegraph Co. v. Myatt, 98 Fed. Rep. 335, the United States Circuit Court for the District of Kansas held the act of Kansas, creating the Court of Visitation, to be in conflict with the Federal Constitution, because it entrusted to one tribunal final judicial powers as well as wide powers of an administrative and legislative character. The Court said (pp. 354, 355):

> "In view of what has been said of the court of visitation and the nature of the various powers conferred upon it, would a judicial proceeding before said court to determine the reasonableness of a body of rates be due process of law, within the meaning of the first section of the fourteenth amendment to the constitution? Due process of law in judicial proceedings means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In legislative proceedings it requires a conformity to the settled maxims of a free government, and an observance of constitutional restraints and requirements. In either case it means that there should be an omission to exercise substantial powers appertaining to the other department. Courts can not legislate and pass judgment thereon. Legislative bodies, or boards that are constituted as legislative agencies, can not render judgment upon their legislative acts. In either case neither the proceeding nor the result would be due process of law. . . . It would certainly be as inconsistent with our system of jurisprudence to empower them to act judicially in matters whereof they had legislative or administrative cognizance, as it would be to confer judicial powers upon an executive officer. . . . That the important powers of government differing so widely in their essential characters might lawfully be vested in a single board or tribunal, to be exercised upon the life, liberty or property of a person, is a startling proposition, and it would suggest the inquiry whether our plan of government has not insensibly drifted far away from its ancient moorings. . . . I am

therefore of the opinion that a proceeding before the court of visitation, in which it is sought to secure a judgment upon the reasonableness of a body of rates prescribed by it to be charged by a railroad or a telegraph company, would not be due process of law within the meaning of the Federal Constitution."

The same statute came shortly afterward before the Supreme Court of Kansas, and that court likewise held it to be unconstitutional and void, "for the reason that in the powers conferred upon that tribunal, legislative, judicial, and administrative functions are commingled and interwoven together in a manner violative of the constitutional requirement that the three great departments of government shall be kept separate, and the powers and duties of each exercised independently of the others." State v. Johnson, 60 Pac. 1068.

Counsel for defendant in error on page 2 of his brief calls attention to the fact that the railroad commission in its order refusing to exonerate plaintiff in error reserved the right to "suspend the operation of this order should said company reduce its rates on said commodity from said points of shipment to Lebanon, Ky., said reduced rates to be approved by this Board." In other words, the railroad commission required plaintiff in error, as the price for retaining the perfectly legitimate and innocent competitive traffic to Louisville, which was of very great value to the plaintiff in error, to reduce its rates to Lebanon to such figure as the commission might approve, although such rates were not attacked as unreasonable, were in nowise increased by the enforced charging of the low competitive rate to Louisville, and were far within the maximum authorized by the Legislature.

The Court of Appeals, both in this case and in the former long and short haul case already referred to, has clearly indicated that whatever rate to Lebanon the railroad commission might thus have imposed upon plaintiff in error, would have been wholly free from judicial review. If plaintiff in error had been

willing to acquiesce in such rate, although unreasonably low, in order to retain the valuable traffic to Louisville, it could have had no redress in any court. If it, instead, had preferred to surrender the valuable competitive traffic to Louisville, it still would have had no redress in any court.

Ever since the decision by this Court of the case of Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, it has been settled that:

> "The question of the reasonableness of a rate of charge, for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

It is true that in that case the commission could take affirmative action detrimental to the railroad company without a hearing and without notice to the Company. It is equally true that under the proviso of Section 218 the commission may do that which is detrimental to the railroad company, that is, refrain from taking any action at all, without any hearing of the railroad company, and may without violation of its duty absolutely refuse to consider any application presented by the company. But the case just cited laid stress upon the fact that the question involved was a question for an investigation by judicial machinery. That doctrine has never been departed from by this court. While the court has not perhaps always insisted that the investigation before the rate-fixing tribunal

should be judicial in its character, and indeed, has perhaps regarded any investigation as wholly immaterial when the rates were fixed directly by the legislature, yet in every case, no matter how the rates have been fixed, the court has upheld the right to an investigation in the courts as a matter of right guaranteed to the railroad company or other corporation by the Constitution of the United States.

The operation of Section 218, as construed by the Court of Appeals, is peculiar in the fact that the railroad company has no opportunity at any time or in any manner to invoke the protection of any court. If the section is in itself constitutional, then the company must give up its valuable competitive traffic or reduce its intermediate rates to such figure as the Railroad Commission may impose. If the Commission imposes unreasonably low rates, the railroad company can not have that action reviewed in any form. So that with respect to the traffic, both long haul and short haul, the railroad company is under this construction deprived of the judicial protection which has been afforded every corporation under every other railroad commission act in the country.

Following out the same theory, counsel for defendant in error contends that the forms of procedure may in all matters vary as the legislature may prescribe. He overlooks the fact that the procedure must be reasonably adapted to the subject-matter. It is true that with respect to some subject-matters, very summary forms of procedure are admissible. For example, property may be assessed by an administrative officer or board, and the courts will refuse to review that assessment. This, however, is admittedly an exception to the general rule. It is an exception because the exigencies of the public treasury will not admit of the delay which would be involved in ordinary proceedings in court. Moreover, it is an exception which operates substantially alike upon all citizens and persons within the protection of the State. Moreover, it affects any one citizen or person only in an incidental way. While it is vital to the State, it is not ordi-

narily vital to any one person whose property is assessed. None of these reasons applies to making the finding of an administrative board conclusive in like manner with respect to the right of a railroad company to use its property in a reasonable, innocent way in the prosecution of a legitimate railroad business. There is no corresponding public exigency; if the railroad company inflicts injury by an illegal act, it may be made to respond in damages. The right thus involved is one of vital importance to the railroad company, and when all other persons are permitted to enjoy even their incidental rights under the protection of the courts of the country, it certainly is not proper to relegate railroad companies for the final judicial determination of their most vital rights to a mere administrative tribunal.

However, the argument to differentiate the case of the regulation of railroads from the case of assessment of property for taxation is wholly unnecessary, because the courts of this country have consistently, from the Minnesota case, 134 U. S., down to the present hour, refused to accept as final and conclusive the findings of a railroad commission, or even of a legislature, but have in all cases proceeded to investigate the question for themselves, and to afford the railroad companies the protection guaranteed to them by the Federal Constitution.

It is occasionally stated that a railroad company in the transportation of passengers and property is performing a function of the State, and is subject to regulation accordingly. Counsel for defendant in error must proceed on the theory that the State may regulate the details of railway traffic to the same extent as if the State were actually operating the railway.

It should be borne in mind, however, that while the State has generally provided highways upon which persons and property might move, and has done this to such an extent that providing such highways may properly be said to be a function of the State, yet neither in England nor in America has the government, except in rare instances, undertaken the duty of transporting either persons or property on any sort of highway,

whether turnpike, canal, or railroad, so that the actual transportation of traffic can not properly be said to be a function of the State. In other words, while frequently furnishing the highway upon which common carriers of various sorts have conducted their business, the government itself has not conducted the business of a common carrier any more than it has conducted the business of keeping inns, although generally providing the highways to and from those inns. It is true the government may regulate the management of the business of both common carriers and innkeepers, but it is not because they are performing a function of the State, but because they are performing a business which is affected with a public use. As was said in L. S. & M. S. R. Co. v. Smith, 173 U. S. 684-698:

> "The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest."

In the case last cited the court also said (page 690):

> "A railroad company, although a *quasi* public corporation, and although it operates a public highway, Cherokee Nation v. Southern Kansas Railway, 135 U. S., 641; Lake Shore, etc., Railway v. Ohio, 173 U. S. 285, 301, has, nevertheless, rights which the Legislature can not take away without a violation of the Federal Constitution, as stated in Smyth v. Ames, 169 U. S. 466, 544. A corporation is a person without the protection of the Fourteenth Amendment."

And again (page 697):

> "What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company, upon its own volition, purely as

a matter of internal administration, and in regard to the details of its business, which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company."

If the numerous decisions of this Court on this subject mean any thing, they mean that under the Fourteenth Amendment to the Constitution of the United States, no State can, either through its legislature or a railroad commission, destroy the legitimate uses of a railroad or any one of such legitimate uses, nor can the State, either through its legislature or a railroad commission, so reduce the rates of a railroad company as to interfere with its obtaining what, under all the circumstances, is a reasonable income from its property, and that the courts must have the right to decide these questions for themselves. In the Minnesota case, 134 U. S., this Court held the act of Minnesota void because, as construed by the State court, it deprived the railroad company of all opportunity to question in the courts the correctness of the rates fixed by the railroad commission. In every case that has since arisen there has been in some form an opportunity for railroad companies to question in the courts the reasonableness of rates fixed for it by a railroad commission. Such opportunity has not always, or perhaps generally, been afforded by the railroad commission act itself, but the *nature* of the subject has been such as to give to the railroad company a fairly reasonable opportunity to bring the question before the courts.

If Section 218, as construed by the Court of Appeals of Kentucky, means any thing, it means that the State can either absolutely destroy perfectly legitimate and innocent competitive traffic, the enjoyment of which is essential to the carrier's prosperity, and not injurious in any way to the public, or that the railroad commission may use the threatened loss of this competitive traffic as a lever to force the railroad company to adopt

such rates on non-competitive traffic as the commission may fix, free from any possibility in any form of securing a consideration of those rates in court.

The difference between Section 218, as construed by the Court of Appeals, and all of the railroad commission cases which have heretofore come before this court (except the Minnesota act which was held void) is that Section 218 not only fails to provide judicial machinery for investigation of the subject, but, by reason of its peculiar operation in imposing the initiative on the carrier and making whatever the carrier does appear as done of its own volition, it absolutely destroys all opportunity in any form of resorting to the courts, if it is valid for any purpose as construed by the Court of Appeals.

VI.

Counsel for defendant in error points out that no application to the Railroad Commission was made.

As is pointed out in our original brief, if Sec. 218 as construed by the Court of Appeals is valid enough to compel an application to the commission, then it is valid all purposes, for the whole theory of that construction is that the commission's action or refusal to act on the application is not subject to judicial regulation in any form.

But if the section becomes more unconstitutional when the Commission refuses to grant relief, then we know that in the present case the Commission did consider this very matter and did refuse to grant any relief unless the railroad company would adjust its local rates so as to suit the commission's wishes, which wishes, as the Court of Appeals indicates, are free from any review or control by the courts.

Before leaving this branch of the subject we wish to urge on the Court again the careful consideration of the dissenting opinion herein, which was concurred in by three of the seven Judges of the Court of Appeals, and which so forcibly points

out the unconstitutional character of the provisions as construed by the other four Judges of the Court.

VII.

The comments of counsel for defendant in error upon the question of Interstate Commerce might be pertinent if the provisions under consideration constituted in themselves means fairly and reasonably adapted to secure some object having an appreciable relation to promoting the public welfare; but since those provisions as construed by the Court of Appeals are not called for by, and can not possibly promote, the public welfare in any direction, and instead of being means fairly adapted to a legitimate end are really the most arbitrary interference with a highly important and perfectly innocent branch of railroad business, the fact that those provisions do substantially embarrass commerce among the States is worthy of consideration, although that interference may be in one sense indirect.

VIII.

The comments of defendant's counsel on plaintiff in error's contention that the provisions in question, as construed by the Courts of Kentucky, impair the obligation of its contract with the State, seem to be based on an entire misconception of that contention. He seems to assume that the contention is that plaintiff in error is exempt from legislative regulation, and that it has acquired the indefeasible right to exercise its own discretion in the management of its business, and that the State of Kentucky has, by the charter granted plaintiff in error, bound itself never to exercise its police power in regulating the use of the highway occupied by plaintiff in error's railroad. It is unnecessary to say that no such contentions are made.

Counsel seems to think that plaintiff in error looks upon its charter as a positive grant authorizing it to discrimi-

nate in its charges. The word "discriminate" with respect to railroads is obviously used in two entirely different senses. It is frequently used in the sense of unjustly discriminating. Plaintiff in error admits to the fullest extent the right of the State to prohibit all such unjust discriminations, and to enact all laws which are reasonably adapted to secure immunity to the citizens or localities of the State from such unjust discriminations. The word "discriminate," however, is also used in its primary sense, *i. e.*, using one's discretion or judgment. In that sense every railroad company has a right to discriminate as a necessary part of its right to do business. When a railroad company charges a rate of five cents per hundred pounds on a car load of brick, and two dollars per hundred pounds upon a box of dry goods, it discriminates. If it did not have the right to discriminate between high class and low class freights, no railroad in this country could be operated. The State would not have the right to say that all freights of every class shall be carried at the same rate per ton, for that would be wholly unreasonable, would have no relation to promoting public welfare, and would virtually destroy the ability to operate the railroad. In this sense the railroad company does not have to look to any positive grant of power in its charter. The power to construct and operate a railroad necessarily implies power to exercise judgment in fixing its rates. While discrimination of this character may be reasonably regulated, it can not be destroyed or so hampered as to result in an unwarrantable partial destruction.

Counsel for defendant in error seems much impressed by the fact that in 1860 an amendment was granted authorizing railroad companies to make discrimination in favor of freights and passage for long over short distances, and seems to think that if the State had the right to repeal this authority, it had the right to make an iron-clad long and short haul law. It should be observed, however, that this amendment seemed to embrace an unlimited authority to discriminate, and so was a power which the railroad company did not have independently of such authority, and is

not the power which we now claim. It clearly did not restrict the right to discriminate to cases of competition or require the long haul rates to be as high as the competition would permit or prohibit increasing the short haul rates on account of the less charges for longer hauls. We do not rely in any sense upon that amendment, or upon the theory that we have in any way an unlimited power to discriminate. We simply claim the right to charge reasonable rates for non-competitive traffic, and at the same time the right to engage in profitable competitive traffic at less rates, where doing so does not increase the rates which would otherwise be charged on the non-competitive traffic, does not give the competitive point any advantage over the non-competitive point, and does not in anywise injure one person or locality, or build up another, in other words, where the long haul rate is as high as can be charged, and where it does not necessitate increasing the short haul rate to more than it would otherwise be—the short haul rate being at all times just and reasonable in itself. The right to do this under the circumstances existing in Kentucky, where it is impossible to reduce intermediate rates to the basis of long haul rates, and where at the same time the retention of the long haul business is essential to the prosperity of the railroad company, is a right which the Company had independently of the amendment of 1860. It is a right which was much narrower than the right granted by that amendment, and it is a right which it still has under the Constitution of the United States. The denial of that right does not in any way tend to promote the public welfare. It is not a means fairly adapted to secure rates reasonable in themselves for the shorter hauls, or the prevention of unjust discrimination between localities. It is an arbitrary interference with what under the circumstances of this record is a reasonable use of the railroad company's property, and it gives to the railroad commission, which is a wholly non-judicial tribunal, power to give or withhold, at its own arbitrary pleasure, the right to engage in most important branches of business which are perfectly legitimate. Since by virtue of its charter the railroad company has a contract right

to the reasonable use of its property for railroad purposes, Sec. 218, as construed by the Court, impairs the obligation of that contract as well as contravenes the Fourteenth Amendment.

The argument of defendant's counsel that plaintiff in error has consolidated with other corporations and is not therefore now the corporation which was granted the charter of 1850 is wholly unsupported by the record. There is not a syllable in the record to show that the plaintiff in error has ever at any time consolidated with any other company, although it may have had the right to do so.

IX.

This very lengthy reply to the brief for defendant in error has been prompted by an earnest desire to discuss in all its bearings, as far as practicable under the circumstances, the questions involved, which are of paramount importance.

The record shows that the enjoyment of long haul competitive traffic at less than non-competitive rates is of an importance to the railroads and public in Kentucky vastly greater than is likely to be appreciated by those not familiar with the local situation who look at the matter from the standpoint of traffic conditions in other sections of the country.

In addition to the direct value of the question to the industrial interests of the State, the principles involved are of the most far-reaching character. The question involved is whether a State may so devise a form of regulating certain essential branches of railroad traffic as to evade entirely that judicial supervision which this Court, in order to afford to railroad companies the protection to which it is well settled they are entitled under the Constitution of the United States, has consistently enforced.

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OCTOBER TERM, 1901.

No. 7.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

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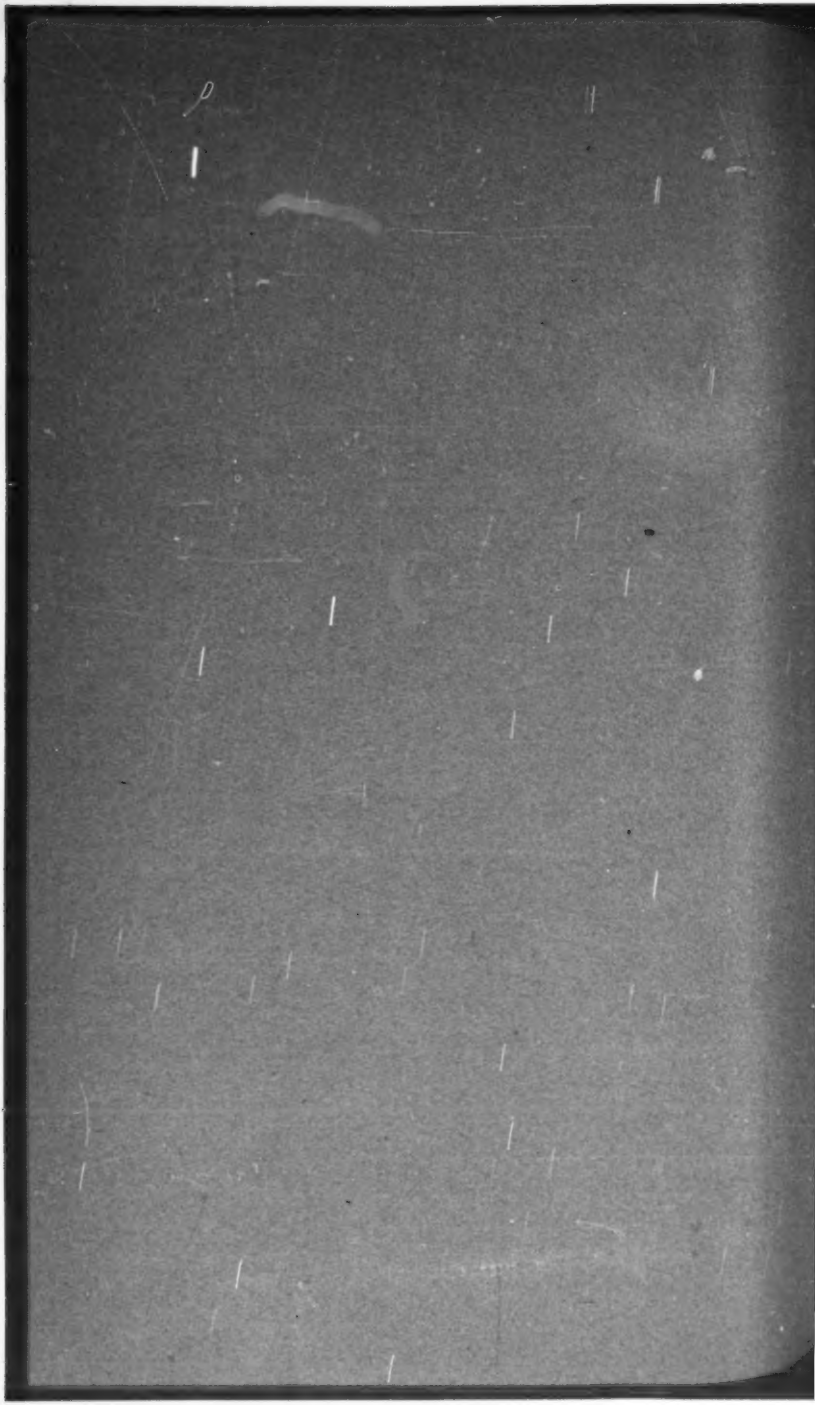

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 7.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

I.

The law-making power of the State is not the final judge as to whether its enactments have such reasonable relation to the promotion of the public welfare as to justify them as an exercise of the police power. The courts have repeatedly, as is shown by many cases cited in our other briefs, stated that they have the power to inquire into this matter, and are not concluded by the action of the law-making power; and in many cases the court has

actually set aside such enactments because the court believed, the law-making power to the contrary notwithstanding, that the enactments had no reasonable relation to the police power, but were an unreasonable interference with the rights of the citizen. In addition to the cases already on our briefs, the recent case of Wisconsin, &c., R. Co. *vs.* Jacobson, 179 U. S., 287, contains a clear statement of the right and duty of the court in cases of this character, and of the scope of the inquiry which is open to the court, notwithstanding the declaration of the law-making power.

These cases show that this right to hold enactments in conflict with the fourteenth amendment, because an unreasonable and unjustifiable interference with the citizen's use of his property, does not depend upon any showing of confiscation in the particular case. On the other hand, it depends upon showing that the enactment in question has no reasonable tendency to promote any legitimate object of the police power, but does amount to an improper interference with the citizen in the use of his property. Such enactments have been held void entirely without any showing that they would in effect destroy, or even substantially impair, the earning power of the citizen's property. If the enactment goes to the extent of destroying any element of the use of the property, or any incident to that use which is thoroughly consistent with the public welfare, or, in other words, which does not tend in any way to injure others in the use of their property and the enjoyment of their rights, and when at the same time such prohibition has no reasonable tendency, either directly or indirectly, to promote any object for which the police power can be exercised, it necessarily follows, according to the well-settled doctrine of this court and of

all other courts, that such an enactment is an unconstitutional invasion of property rights.

The case of Powell *vs.* Pennsylvania, 127 U. S., relied on by counsel for defendant in error, clearly illustrates that this court will assume to inquire whether a State enactment has a reasonable relation to the promotion of the public welfare, and will base its determination as to the constitutionality of the enactment under consideration upon the result of its inquiry. In that case the court, after canvassing fully the reasons which could have prompted the legislature to pass the statute against the sale of oleomargarine, was unable to say that the statute might not have a reasonable tendency to protect the public health, and consequently could not declare the statute unconstitutional. Here we contend the court, upon an examination of the matter, is bound to say that the Kentucky long and short haul law, as construed by the court of appeals of Kentucky, cannot have any tendency whatever to promote the public welfare.

II.

The mere fact that a railroad company is engaged in a quasi-public business does not give the law-making power unlimited right to regulate its affairs. In regulating the physical operation of railroads the legislature can, of course, make such prohibitions or requirements as have a reasonable tendency to promote public safety, convenience, etc. In interfering with the adjustment of the rates which the railroad company shall charge for the transportation of persons and property, the legislature

cannot, as is clearly shown by L. S. & M. S. R. Co. *vs.* Smith, 173 U. S., 684–697, control that matter to the extent to which the railroad company itself can do so. On the contrary, the legislature's authority is limited, as is shown by the last-mentioned case, page 698, to preventing extortion or unreasonable charges or exactions. These unreasonable charges must necessarily fall into one or the other of the two comprehensive classes of extortion and unjust discrimination.

The case of East Tennessee, &c., R'y Co. *vs.* Interstate Commerce Commission, 181 U. S., 1, clearly illustrates that a prohibition proceeding upon exactly the same theory as the long and short haul law of Kentucky proceeds—*i. e.*, which absolutely ignores the element of competition—has no tendency to prevent either extortion or unjust discrimination.

Such a prohibition cannot reasonably relate to the prevention of extortion,—

"For, of course, a decree which ordered the carriers to "desist from charging a greater compensation for the lesser "than for the longer haul would be in no way responsive to "the conclusion that the rate for the lesser distance was un-"reasonable in and of itself. Such a decree would in effect "authorize the carrier to continue to charge at its election "a rate which was in itself unreasonable to the shorter "point" (East Tenn., &c., R'y *vs.* I. C. C., 181 U. S., 23).

Nor can it reasonably relate to the prevention of unjust discrimination.

"The only principle by which it is possible to enforce the "whole statute is the construction adopted by the previous "opinion of this court—that is, that competition which is

"real and substantial and exercises a potential influence on "rates to a particular point, brings into play the dissimilar- "ity of circumstances and conditions provided by the statute, "and justifies the lesser charge to the more distant and com- "petitive point than to the nearer and non-competitive place, "and that this right is not destroyed by the mere fact that "incidentally the lesser charge to the competitive point may "seemingly give a preference to that point, and the greater "rate to the non-competitive point may apparently engender "a discrimination against it. We say seemingly on the one "hand and apparently on the other, *because in the supposed "cases the preference is not 'undue' or the discrimination 'un- "just.'*"

"To compel the carriers to desist from all Nashville traffic "under the circumstances stated would simply result in de- "flecting the traffic to Nashville to other routes, and thus "entail upon the carriers who were inhibited from meeting "the competition, although they could do so at a margin of "profit, the loss which would arise from the disappearance "of such business without anywise benefiting the public" (East Tenn., &c., R'y *vs.* I. C. C., 181 U. S., pp. 18, 19, 20).

III.

The decision of the court of appeals of Kentucky in the case of the I. C. R'y *vs.* Commonwealth, decided October 25, 1901, and which is printed as an appendix to this brief, is a reiteration by that court of its doctrine that both in fixing rates generally and in regulating the rate adjustment over long hauls and short hauls, or otherwise, the action of the law-making power is final and not subject to any sort of review by the courts.

IV.

If the law-making power of the State can absolutely prohibit a perfectly legitimate branch of the railroad business, such as is involved in this case, when such a prohibition has no reasonable tendency to promote the public welfare, it can, of course, equally prohibit any other branch of the railroad business and equally hamper the essential discretion of the railroad company in the matter of adjusting its rates in other directions.

The iron-clad prohibition of charging more for a short haul than for a long haul, now contained in the Kentucky statutes, is utterly unnecessary to the prevention of extortion or unjust discrimination. Both these objects, so far as the adjustment of the long and short haul rates has a bearing upon them, could be fully accomplished by a law having the effect of section 4 of the Federal act to regulate commerce. A prohibition going to the extent of the Kentucky prohibition absolutely destroys traffic of vital importance to the railroad companies, when such destruction does not promote or tend to promote the prevention of either extortion or unjust discrimination.

V.

But even if an absolute and iron-clad prohibition of charging more for the short than for the long haul would be constitutional, notwithstanding its unjustifiable destruction of legitimate traffic of great value to the railroads and the public, it does not follow that it is constitutional to make the same prohibition coupled with purely arbitrary power of relief in the railroad commission.

If the ordinances considered in Yick Wo *vs.* Hopkins, 118 U. S., 356, had absolutely prohibited the conducting of a laundry business in frame buildings, the court might have been unable to say that such prohibition did not have a reasonable relation to the public safety. When, however, the prohibition did not have this effect, but left it to the arbitrary power of a board of supervisors to say when the laundry business could be so conducted and when it could not be so conducted, such a qualification negatived the idea that the prohibition was necessary to the public welfare, and, further, gave the final power of prohibiting or permitting the laundry business in frame buildings to a mere administrative board, without prescribing any rule as to how that power should be exercised, and thus made the scheme of regulation essentially inconsistent with the fundamental theory that ours is a government of laws and not of men. The court of appeals of Kentucky says that the Kentucky long and short haul law prescribes no fixed rule, but leaves the matter in each instance to the determination of the railroad commission. There is no pretense that any rule is laid down, or under the language of the law can be laid down, to govern the railroad commission in granting or withholding the privilege of enjoying the legitimate and valuable competitive traffic which is thus put under its absolute control.

VI.

In the case at bar, we are not confined to merely pointing out what injurious consequences *may* result from the construction put upon the long and short haul law by the court of appeals of Kentucky. The facts which appear in

this record show that the effect in this case is to deprive the plaintiff in error of a perfectly legitimate use of its property, when the use injures no one and when its prohibition helps no one, without any possibility of redress, if the law is to stand as construed by the court of appeals of Kentucky.

WALKER D. HINES,
For Plaintiff in Error.

APPENDIX.

KENTUCKY COURT OF APPEALS, OCTOBER 25, 1901.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
COMMONWEALTH OF KENTUCKY, *Appellee*.

Appeal from the Hardin circuit court.

Opinion of the Court by Judge Hobson.

Appellant was indicted in the Hardin circuit court, and fined $200.00 for charging more for hauling a car-load of coal from Deanfield, Kentucky, to Stevensburg, Kentucky, than from Deanfield through Stevensburg to Louisville. The indictment was returned June 10, 1899. At that time the railroad commission had not determined whether appellant should be exonerated as provided by the statute. The first question to be determined on the appeal is whether under the statute the carrier may be indicted by the grand jury before the railroad commission has refused to exonerate it. The statute is in these words (Kentucky Statutes, sec. 820):

"If any person owning or operating a railroad in this State or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin circuit court, or the circuit court

of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission, and after such order the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

In the construction of statutes the cardinal aim of the court is to arrive at the intention of the legislature. The court will presume that the legislature meant something by all the provisions of the statute, and will endeavor to give them all a fair effect. If the legislature had intended indictments to be found for each offense, regardless of action by the railroad commission, we see no reason why the section might not have stopped with the first sentence defining the offense and providing for its punishment, for by the next section (Kentucky Statutes, sec. 821) it is made the duty of the commission:

"To see that the laws relating to all railroads, except street, are faithfully executed;" and under this provision it would be the duty of the commission to see to violations of the preceding section. Not only so, but it is provided in section 820 that if the commission deems it proper to exonerate a carrier from the operation of its provisions an order to that effect shall be made, and after such order the carrier shall not be prosecuted for that matter. To indict the carrier in the first place without action by the railroad commission would be to deprive it of all benefit of this provision. If the commission had only power to pass on the same facts as the grand jury, it might, perhaps, be maintained that the legislature intended to provide a cumulative remedy and that a preliminary hearing before the commission was not essential. But such is not the fact. The statute is made pursuant to the following provision of the constitution (section 218):

"It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the railroad commission, such common carrier or person, or corporation owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section."

In construing this provision in L. & N. R. R. Co. *vs.* Commonwealth, 20 R., 1380, it was held that the circumstances or conditions exempting the railroad altogether from the operation of the section did not include competition with other lines; and in the subsequent case of L. & N. Railroad Co. *vs.* Commonwealth, 21 R., 232, this ruling was adhered to; and it was further held that in such cases the power was vested in the railroad commission to exonerate the carrier. We said:

"It is urged that this construction of the constitution will allow coal and other freight from without the State to be shipped cheaper than they can be hauled to the same point if shipped within the State, as under the interstate commerce act competition is held to exclude the carrier from the long and short haul clause. The constitutional convention, no doubt, had just such considerations in mind when it gave the railroad commission the plenary powers conferred on it as above explained. It is the duty and, no doubt, will be the pleasure of the railroad commission to so regulate the matter that no injustice shall be done any industry in the State, and the true interests of the Commonwealth as a whole be promoted."

It will be observed that the constitutional convention did not adopt a hard and fast rule making the charge of more for the short than for the long haul unlawful, but expressly empowered the commission to authorize the railroad to charge less for longer than for shorter distances, and to prescribe from time to time the extent to which the carriers might be relieved from the operation of the section. There were many industries in the State whose interests required this. More than one coal famine had occurred. The only security against a recurrence of this trouble was our domestic coal; but this could not be available unless given lower rates, so that it could compete in the market with coal shipped by water. If it could not thus compete, it could not be relied on as a supply in an emergency. The low rate in this case was given on coal shipped to Louisville,

because it there came in competition with the coal brought down the Ohio river. The railroad commission was the only tribunal authorized to relieve appellant from the operation of the section. No such power was vested in the courts. The question of competition could not be examined there, nor could it be shown that a proper case existed for exoneration from the section. The legislature, therefore, provided for the preliminary hearing before the railroad commission, not as a cumulative remedy, but that it might determine whether the carrier should be exonerated or not, and, therefore, it was provided that if the commission relieved the carrier from the operation of the section no prosecution should be had on account of the matter complained of. It also further provided that if the commission failed to exonerate the carrier it should make an order in writing to that effect and furnish "a statement of the facts, together with a copy of its order to the grand jury of any county the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense." The requirement that the commission should furnish the grand jury a copy of its order *in order that* the railroad company might be indicted for the offense must be read in connection with the previous clause, that if the company was exonerated the railroad company should not be prosecuted. The plain meaning of the two together is that the railroad company may be indicted for the offense if not exonerated, and may not be indicted if it is exonerated, and the copy of the order of the commission refusing to exonerate it is required to be furnished to the grand jury *in order* that the company may be indicted.

From the section as a whole it is clear that the legislature had in mind providing for the exoneration of the railroad from its provisions in proper cases and exempting the carrier from criminal liability to this extent. It therefore provided for an investigation by the railroad commission, a determination by it whether it deemed it proper to exonerate the

railroad and for the enforcement of its decision by indictment by the grand jury in case the railroad was not exonerated. To allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. The legislature had no such result in mind, but clearly aimed to secure to the carrier a hearing on this question.

The long and short haul matter is only another form of undue discrimination and preference, which are provided for by section 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882 (see General Statutes, 1021), which was in force at the time of the adoption of the constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the State should be looked to in these matters, and that the railroad commission must first determine them before the grand juries of the State should find indictments.

The precise question raised in this case was before this court in the case of Louisville & Nashville Railroad Co. *vs.* Commonwealth, 21 R., 239. In that case the company had been fined under an indictment found at the request of the railroad commission, and one of the grounds of new trial was that the court had erroneously admitted the order of the railroad commission refusing to exonerate the company to be read to the jury on the trial, and it was insisted that this had prejudiced the defendant on the trial and caused a large fine to be assessed against it. The reading of the order of the commission was clearly prejudicial to the defendant, if improper. This court, however, affirmed the judgment and said:

"There was no error in allowing the order of the railroad commission to be read. This has in effect been determined by this court in the preceding cases."

The matter was not further elaborated at that time because it was considered concluded by the reasoning of the preceding case and the judgment on the former appeal (L. & N. Railroad Co. *vs.* Commonwealth, 20 R., 1380). It was proper to read the order of the railroad commission to the jury only because the statute required a copy of the order to be filed with the grand jury *in order that* the defendant might be indicted. It was the basis of the proceeding without which the prosecution could not be had. Upon a reexamination of the question we adhere to the conclusion then reached.

It is also insisted for the appellee that the statute thus construed is unconstitutional; but section 218 of the Constitution prescribes no penalty. What penalty should be imposed or when was absolutely within the discretion of the legislature. Without section 820, there is no provision of law for imposing a penalty, and if a penalty cannot be imposed under that section on the facts of this case, then there is no provision of law under which the prosecution can be maintained. We do not question the power of the legislature to provide for prosecutions without action by the railroad commission; we only determine that it has not done so by the provision quoted.

Thus construed, the statute does not seem to us in violation of any right secured by the Federal Constitution. The convention in framing the State constitution, if it had seen proper, might have made it unlawful to charge more for the short than for the longer haul under any circumstances. When it did not adopt an absolute rule to this effect, but allowed the carrier to be relieved from the operation of the section, this was more favorable to the carrier than an absolute prohibition would have been. The convention might have vested the power of exoneration in the legislature and authorized it by general laws to regulate the subject. When it created a special tribunal to determine when and under what circumstances the highways of the State might be

so used as to give some shippers preference over others it violated no right of the railroads, for the State in the exercise of its police power had the right to protect the people of the State from extortion and discrimination on the public highways constructed under the power of eminent domain and exercising franchises bestowed by the State. The right of due process of law secured by the Constitution does not extend to matters which at common law were not of judicial cognizance so as to require them to be tried now by the courts (Wulzen *vs.* San Francisco, 101 Cal., 15; 40 Amer. St. Rep., 17; Eames *vs.* Savage, 77 Me., 212; 52 Amer. Rep., 757; Weimer *vs.* Bunberry (Cooley, judge), 30 Mich., 201). The question, what tolls may be charged on a highway, or when or under what circumstances it would be right to charge more for the short than for the longer haul was not at common law of judicial cognizance, and the State has the right in the exercise of its police power to commit the decision of these questions to other branches of the Government than the judiciary. It may create special agencies for the determination of such matters and make their judgments final. Ultimate power must be vested somewhere. It cannot be assumed that the judiciary will be less liable to err than other departments of the Government.

Judgment reversed with directions to dismiss the indictment.

Whole court sitting. Chief Justice Paynter, Judges Guffy and White dissenting.